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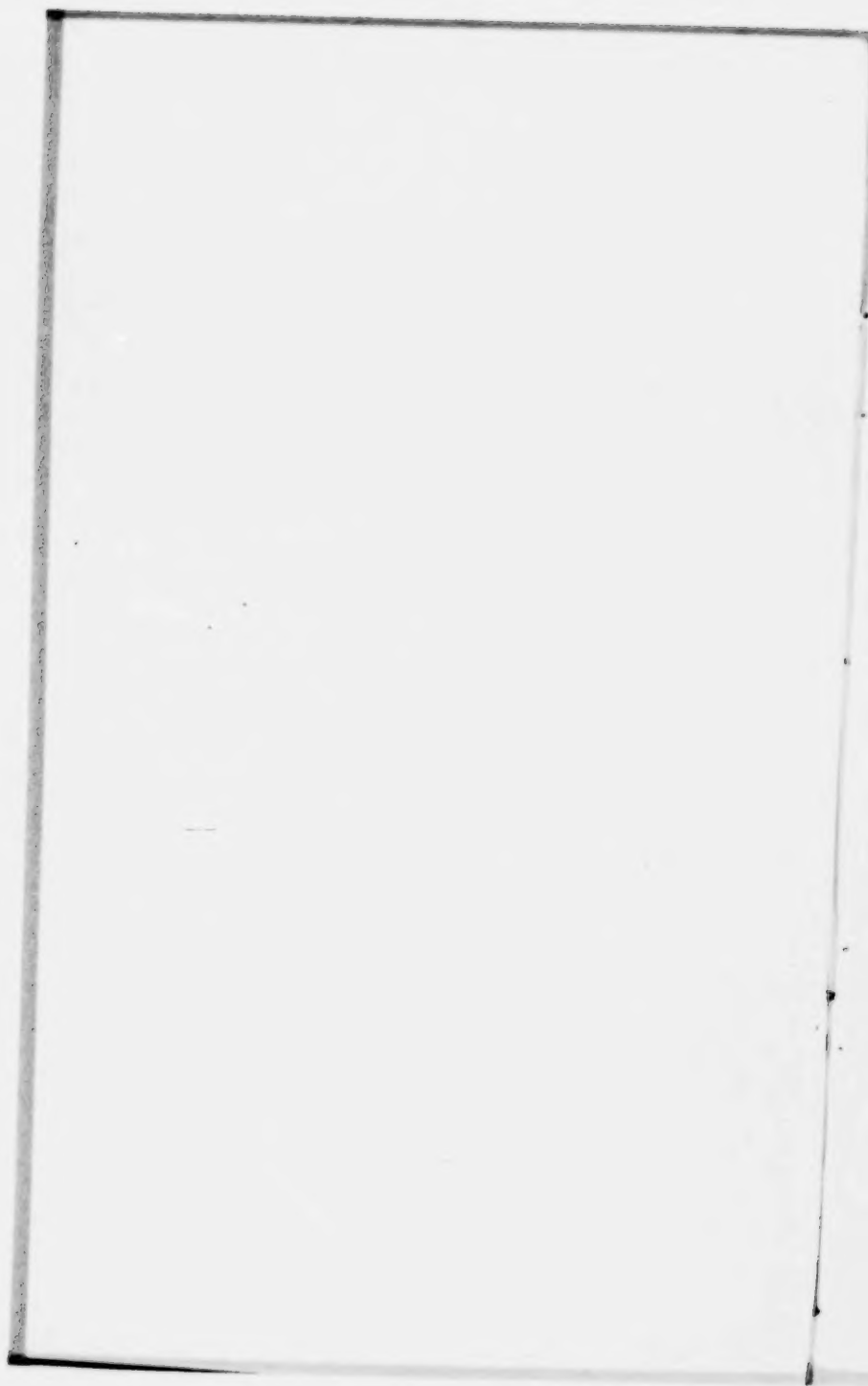
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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 357.

HARRY B. TEDROW, as United States District
Attorney for the District of Colorado,

APPELLANT,

vs.

THE A. T. LEWIS & SON DRY GOODS COM-
PANY, THE DENVER DRY GOODS COM-
PANY, THE DANIELS & FISHER STORES
COMPANY, THE HEDGCOCK & JONES SPE-
CIALTY STORES COMPANY, THE POWERS-
BEHEN CLOTHING COMPANY, THE FOX-
TUS SHOE COMPANY, THE BROAD-
HURST-YOUNG SHOE COMPANY, THE
NEUSTETER SUIT COMPANY, THE COT-
TRELL CLOTHING COMPANY, THE JOS-
LIN DRY GOODS COMPANY, THE GAN-
DOWNS CLOTHING COMPANY, THE MAY
DEPARTMENT STORES COMPANY, THE
GOLDEN EAGLE DRY GOODS COMPANY,

APPELLEES.

APPELLEES' BRIEF.

STATEMENT.

This is a suit in equity brought by the thirteen principal retail merchants of Denver, Colorado, who are dealers in wearing apparel, against the United

States Attorney for the District of Colorado. The purpose of the suit was to procure a judicial determination that the Act of Congress, usually called the Lever Act, approved August 10th, 1917 (40 Statutes, 276), as amended by the Act of Congress approved October 22nd, 1919, and designated "The Food Control and the District of Columbia Rents Act" (41 Statutes, 297) was, as to said plaintiffs (appellees here), and as to their business as retail dealers in wearing apparel, invalid because in conflict with the Constitution of the United States, and that the construction placed upon said enactments by the defendant (appellant here) in accordance with which he, by virtue of his office, was proceeding to enforce said Acts against the plaintiffs was especially obnoxious to the Constitution and therefore invalid. The particulars in which and the grounds upon which said legislation and the construction placed thereon by the United States Attorney were asserted to be invalid are set forth specifically in the bill of complaint (Rec., p. 7, par. V, p. 10 et seq., par. VII) are hereinafter dealt with at length and need not be here repeated. Upon these assertions of unconstitutionality and upon specific and extensive allegations of irreparable damage to property and property rights caused or threatened by the imminent enforcement of the unconstitutional provisions of said Acts, particularly the enforcement thereof in the manner and under the construction of the same insisted upon by the United States Attorney (Rec., p. 5, par. III, p. 7, par. V, pp. 15, et seq., pars. IX to XIV) injunctions both temporary and permanent directed to said United States Attorney and prohibiting such enforcement were sought.

The case, therefore, falls within a well-known category, in respect of which this court has frequently held that equity has jurisdiction of such a suit and also has power to afford such relief as that which was here sought and granted.

Ft. Smith & Western Co. v. Mills (decided June 1, 1920), U. S. Advance Opinions 1919-1920, p. 630.

Jacob Ruppert vs. Caffey, 251 U. S. 264.

Hamilton vs. Kentucky Distilleries Co., 251 U. S. 146.

Hammer vs. Dagenhart, 247 U. S. 251.

Adams vs. Tanner, 244 U. S. 590.

Wilson vs. New, 243 U. S. 332.

Truax vs. Raich, 229 U. S. 33.

Lewis Publishing Co. vs. Morgan, 229 U. S. 288, 600.

Philadelphia Co. vs. Stimson, 223 U. S. 605, 621.

Ex parte Young, 209 U. S. 123, 161, 162.

Dobbins vs. Los Angeles, 195 U. S. 223, 241.

Smyth vs. Ames, 169 U. S. 466.

On April 8th, 1920, the complaint was filed (Rec., p. 4 et seq.).

On April 9th, 1920, the motion of the defendant United States Attorney, which had theretofore been filed and argued, to dismiss the bill of complaint was denied (Rec., p. 1). On the same day the motion of the plaintiff merchants for a temporary injunction was granted and said injunction issued (Rec., p. 2).

On May 8th, 1920, the defendant United States Attorney filed his answer (Rec., p. 19). Thereby the material allegations of the complaint were admitted

except in so far as they were covered by the stipulation and the agreed statement of facts presently to be mentioned.

On May 8th, 1920, coincident with the filing of the answer, a stipulation was filed, signed by the defendant United States Attorney and by the solicitors for the plaintiffs (Rec., p. 34), whereby it was "agreed that this cause is within the equity jurisdiction of this court and that the relief sought is within the power of the court as a court of equity; any and all objections based upon alleged lack of jurisdiction or power as a court of equity are hereby expressly waived." Thereby the plaintiff merchants were relieved of the necessity of presenting evidence of further facts supplementing those alleged in the complaint and expressly admitted in the answer for the purpose of showing damage or threatened damage to their property and property rights. The substantial facts in that regard alleged in the complaint were admitted by the answer, the other facts relating thereto alleged in the bill were obvious and necessary inferences from those admitted, and the stipulation referred to above was an express and conclusive concession of the existence of facts necessary to uphold equity jurisdiction and power which rendered further proof superfluous.

On May 8th, 1920, an agreed statement of facts was filed (Rec., p. 35 et seq.), signed by the defendant United States Attorney and by the solicitors for plaintiffs, in which are set forth at length and in detail, with appropriate references to original sources of information, the further facts upon which the case was heard below.

Upon said complaint, answer, stipulation and agreed statement of facts, the case came on for final hearing and was heard and submitted.

On May 10th, 1920 (Rec., p. 47), as a result of such hearing and submission, final decree was entered whereby said Act of Congress of August 10th, 1917, as amended by said Act of Congress of October 22nd, 1919, was, as to the plaintiff merchants and each of them, declared and adjudged to be invalid "because in conflict with the Constitution of the United States and the Amendments thereto"; and whereby (Rec., p. 48) the temporary injunction was made permanent and the defendant United States Attorney was perpetually enjoined from enforcing against them or either of them said Act of Congress as amended.

As is evident from the foregoing statement, the question necessarily and solely arising upon this record relates to the validity under the Constitution of the United States of the Lever Act of August 10th, 1917, as amended by The Food Control and District of Columbia Rents Act of October 22nd, 1919, either as it is written or as it is construed and sought to be enforced by the Department of Justice through its representative, the defendant United States Attorney.

The specific portion of said Acts of Congress here directly involved is Section 4 of the Act of August 10th, 1917 (40 Statutes, p. 277) as amended by Section 2 of the Act of October 22nd, 1919 (41 Statutes, p. 298).

As originally enacted and until October 22nd, 1919, the Lever Act made no reference to wearing apparel. Its operation was confined to food products and fuel.

By the amendment of October 22nd, 1919 (41 Statutes, 297) the words "wearing apparel" were inserted in Section 1 of the Lever Act, from which the inference is drawn that thereby wearing apparel was included among those things which were by said Act designated and dealt with as "necessaries". And by Section 2 of said amending Act of October 22nd, 1919 (41 Statutes, 298) Section 4 of the original Act (40 Statutes, 277) was amended by adding thereto (what had theretofore been wholly lacking) a penalty clause of an extremely drastic nature which imposed penalties by way of fine and imprisonment which were exceedingly severe, not to say savage.

Those portions of Section 4 of the Act as amended (41 Statutes, 298) which are here involved read as follows:

"That it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities, * * *. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding five thousand dollars or be imprisoned for not more than two years or both; *provided*, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman or other agriculturist, with respect to the farm products produced or raised upon land owned, leased or cultivated by him."

It is earnestly contended by appellants that these provisions of said Act of Congress are, under the Constitution of the United States, wholly invalid as

to them in respect to their business as retail dealers in wearing apparel.

But the defendant below, appellant here, in his capacity as United States Attorney and by virtue of his office, construed said Act and was enforcing it as one under which the question as to whether any particular rate or charge was or was not unjust or unreasonable must be determined with sole reference to the actual original cost of the article sold or offered for sale and under which, in making such determination no consideration whatsoever could be given to the present actual value at the time of sale of the article in question as indicated by what it would then cost to reproduce or replace it by purchase in the wholesale market, or as might be otherwise shown.

Appellees earnestly contend that this construction of the Act necessarily renders it invalid and that enforcement thereof as so construed would clearly deprive them of their constitutional rights.

The situation in which the plaintiff merchants found themselves at the time when this bill of complaint was filed was exceedingly serious. The uncertainty as to what the Act meant, the utter lack of any rule, standard or criterion by which to determine whether any particular rate or charge was, in the sense of the Act, just or unjust, reasonable or unreasonable, the fact that willfulness and intent were apparently not necessary elements of the offense and that under this Act one might be a criminal although acting in the utmost good faith, the severity of the proscribed penalties, the fact that their entire business consisted of transactions which fell within the purview of the Act and could not be

conducted at all without engaging in thousands of such transactions each day, every one of which, if the rate or charge imposed should thereafter be held to be unjust or unreasonable, would constitute a violation of the Act and subject the merchant to its heavy penalties; and the further fact that, in addition to all that has been said, the Department of Justice, through the defendant United States Attorney, was construing the Act and enforcing it as so construed, in a way to certainly deprive the merchants of a large part of the present value of their property,—all these things and others set forth in the bill of complaint, and which are obviously true, produced a situation which was utterly intolerable and one which, it is not too much to say, rendered it wholly impossible for these merchants and others similarly situated to longer conduct or continue in their lawful and necessary business.

In these days no epithet is more opprobrious or attended with greater odium than that of "profiteer." And yet under this act as construed and administered by the Department of Justice, no merchant, however honest or well-intentioned, or however earnest in his effort to fix only such prices as are just and reasonable, is safe from indictment and prosecution. All must conduct their business, if at all, at the risk of indictment, prosecution, and possible conviction under this act upon each one of the numerous and almost innumerable transactions of which their business consists and without which it cannot be carried on at all. For in every such instance the subsequent indictment, prosecution, and conviction of the merchant will depend upon whether or not someone else, viewing the transaction at a later date

shall come to a different conclusion concerning whether the price fixed and exacted was, as the merchant in good faith believed, just and reasonable.

Even an indictment, although acquittal should later follow, would necessarily be attended with results almost as injurious as a conviction. It is obvious that when it became publicly known that a Federal grand jury had found sufficient cause to indict a merchant for charging prices which were unjust and unreasonable, and so had branded him as a "profiteer" no member of the public would longer deal with his establishment, if there was any other to which to go. This would be true even though, as is usually the case, the competitor to whom business was thus diverted were conducting his business and fixing his prices in exactly the same way and upon the same basis as the merchant first mentioned, but had not as yet been proceeded against under the Statute.

The facts stated above which rendered the situation wholly intolerable are set forth in greater detail in the bill of complaint (Rec., p. 5, Par. III, p. 7, Par. V, p. 9, Par. VI, pp. 15-17, Par. IX to XIV, inc.).

These allegations are sufficiently admitted by the answer and are, for the most part, obvious (Rec., p. 20, Par. III, p. 21, Par. V, p. 23, Par. VI, pp. 30-33, Par. IX to XIV, inc.).

The situation described above was not and is not confined to the State or District of Colorado. It was and is nation-wide. From the date subsequent to October 22, 1919, when efforts to enforce the act against retail merchants in wearing apparel began, it became and still remains the fact that merchants

everywhere find it practically impossible to conduct their business at all. And this condition will continue until relieved by authoritative decisions from this Court upon the questions presented in the case at bar.

In the lower court comment was made upon the fact that objections to the Lever Act because of its alleged invalidity were of relatively recent origin. But the reason for this is not far to seek. So far as concerns wearing apparel, it was not and could not be contended that it fell within the purview of the act until after the amendment of October 22, 1919. And efforts to enforce Section 4 of the act as then amended, did not begin for a considerable period after the date of the amendment.

Moreover, Section 4 of the original Lever Act contained no penalty clause. This was added by the amendment mentioned above. Prior to said amendment it was never contended, so far as we are aware, that Section 4, standing alone, created or defined a crime. The fact is that prior to October 22, 1919, all price fixing or price regulation in respect to the commodities within the purview of the act had been done by the President, or by some commission, board or other instrumentality under his authority, and in every instance the price fixed was definite and determined only after thorough inquiry and investigation. Even if this had not been so, it does not admit of doubt that while the war was flagrant and the national exigency required such sacrifices, patriotism alone would have sufficed to cause the citizens of this country to submit cheerfully and without complaint to such regulations as were then imposed, even though there had been no Statute authorizing them,

or if the Statute which purported so to do had been wholly invalid and unconstitutional.

But the war is now over, the emergency is passed and the national exigency requiring such patriotic sacrifices no longer exists. The time has arrived when citizens can, without just criticism, insist upon the rights guaranteed to them by the Federal Constitution, and when it is the duty of all good citizens so to do.

The guiding rule pursuant to which the provisions of the Constitution which protect against invasion of private rights are to be enforced has frequently been stated by this Court and is no longer open to question.

In *Boyd v. United States*, 116 U. S., 616, the Court, referring to what it designated as a slight invasion of such private right (while in the case at bar the invasion is, as we have shown, of great magnitude and importance), speaking thru Mr. Justice Bradley, said (page 635):

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroach-

ments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

These vigorous words have many times since been quoted with approval and the doctrine which they enunciate applied.

Monongahela Navigation Co. v. United States, 148 U. S. 325;

Interstate Commerce Commission v. Brimson, 154 U. S. 479;

Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 154;

Bram v. United States, 168 U. S. 543;

United States v. Wong Kim, 169 U. S. 654;

Fairbank v. United States, 181 U. S. 301;

Kepner v. United States, 195 U. S. 126;

South Carolina v. United States, 199 U. S. 450;

Gompers v. Buck Stove, etc., Company, 221 U. S. 444, 448.

When, after the amendment of October 22, 1919, efforts were made to enforce Section 4 of the act as so amended, in the manner complained of in the case at bar, such efforts were promptly met by the Constitutional objections which form the basis of this case and which are hereinafter discussed. In the majority of cases the lower Federal Courts have, for one or another of the reasons hereinafter set forth,

held the act unconstitutional. In a few cases the decision has been otherwise. But in every case which has come under our observation wherein the Court has declined to hold the act invalid, it is, we think, evident from the opinion that such conclusion has been reached with reluctance and misgiving, that the Court, making the decision, entertains the gravest doubt as to the validity of the act, and in almost every case declines to hold it invalid because of a feeling that the question involved is one of such importance and its decision of such wide-spread effect, that it would be unbecoming for an inferior court to hold the act invalid and that the question should be left for the decision of this Court.

The decisions in which opinions were pronounced and are available, classified as to their respective dates and the jurisdictions in which they arose are as follows:

Cases Holding Section 4 of the Lever Act as Amended Unconstitutional:

Colorado, the case at bar, April 9, 1920, motion for temporary injunction granted (Rec., p. 2), May 10, 1920, final decree holding the act unconstitutional entered. (Rec., p. 47.)

Missouri, Eastern District: *United States v. L. Cohen Grocer Company*, 264 Fed., 218; District Judge Faris, April 8, 1920. On sustaining demurrer to indictment. The same court had previously, during March, 1920, delivered a similar opinion in directing a jury to find for defendant.

Arizona: *United States v. Peoples Fuel & Feed Co.*, — Fed., — (not yet reported); District Judge

Dooling, March 30, 1920, on sustaining demurrer to indictment.

Michigan, Eastern District: Detroit Creamery Co. v. Kinnane as United States Attorney, 264 Fed., 845; District Judge Tuttle, April 23, 1920. On final decree in an equity suit similar to that at bar. This decree adjudged the act unconstitutional and made permanent the temporary injunction which had been granted on April 20.

Kentucky, Western District: April 30, 1920; District Judge Evans in his charge to the grand jury. Not reported.

Indiana: United States v. Armstrong, 265 Fed., 683; District Judge Anderson, May 26, 1920, on granting motion to quash certain counts of indictment.

Pennsylvania, Eastern District: Lamborn v. McAvoy, 265 Fed. 944. On motion for injunction in an equity case.

Texas, Southern District: District Judge Hutcheson in his charge to the grand jury. Not reported.

*Cases in Which the Courts Have Declined to Hold
Said Amended Section of the Lever Act
Unconstitutional:*

Washington, Eastern District: United States v. Spokane Dry Goods Co., 264 Fed., 209; District Judge Rudkin on overruling demurrers to indictments. The opinion gives plain evidence of the fact that the learned judge delivering it was convinced that the act was unconstitutional, but hesitated to so pronounce it because of the wide-spread importance of such a decision, believing it to be more becoming for a District Court to leave the decision of

such a question to this Court. Thus in the course of the opinion (pp. 211-212) after quoting the language of this Court in *ex parte* Milligan, 4 Wall 2, 120, and in *Hamilton v. Kentucky Dist. & Warehouse Co.*, 251 U. S., 146, to the effect that the war power of the United States is subject to applicable constitutional limitations, including those of the Fifth amendment, the Court says:

"If the war power of Congress and the President is to be thus limited and restricted it will be difficult, if not impossible, to sustain much of the war time legislation of Congress. * * * Of course it will be said, in response to all this, that the unauthorized exercise of power in one case, or in many cases, cannot justify the passage of the present act, if violative of the Constitution, and this is no doubt true; but a decision of such far-reaching consequences, involving as it does, or may, the very life and foundation of the Government *should come from the court of last resort and not from this or any other inferior court.*"

(p. 213) "But without further discussing the rule or the exceptions for reasons already stated, I am of opinion that the act should not be declared unconstitutional *by this court.*"

(p. 218) "It may be that Congress has transcended its constitutional powers, it may be that there is no connection between the selling price of some small article of female attire, and the prosecution of a war which has already passed into history and is little more than a memory, and it may be that the act of Congress is void for uncertainty; *but I am not prepared to so hold.*" (Italics ours.)

New York, Western District: C. A. Weed & Co. v. Lockwood, U. S. Attorney, 264 Fed., 453; District Judge Hazel, May 1, 1920, on denying motion for preliminary injunction in an equity suit similar to that at bar. In the course of the opinion the learned Judge said (p. 457):

"Candor compels the admission that the objection of uncertainty is not altogether free from doubt, and I am in agreement with Judge Rudkin in *United States v. Spokane Dry Goods Co., et al.*, 264 Fed. 209, wherein in overruling a demurrer to a similar indictment he said:" (Here is quoted a portion of the opinion in the Washington case last above cited.)

From the order denying the temporary injunction in the case of *Weed & Co.*, an appeal was taken to the Circuit Court of Appeals for the Second Circuit, which court, in the latter part of May, 1920, announced its decision affirming such order. — Fed., — (not yet reported). Each of the three judges composing the court filed a separate opinion. Jurisdiction of the cause by the Court of Equity was upheld, but the Court declined to declare the act unconstitutional. In the separate but concurring opinion of Circuit Judge Hough, the grounds of his decision are thus stated:

"When the Lever Act was amended this country was and still is in a state that may be described as 'official war'. This is substantially the finding of the *Kentucky Distilleries case*, *supra*. It may be likened to the European 'state of siege', and continues in Congress all the war powers of the United

States. If we were in a state of 'official' peace, this statute would in my judgment be unconstitutional under *International Harvester Co. vs. Kentucky*, 234 U. S. 216; the condemnation there expressed (especially p. 223) is applicable here word for word. It would also be constitutionally obnoxious because it is a gross piece of class legislation; incapable of distinction from that condemned in *Connolly vs. Union, etc., Co.*, 184 U. S. 540.

"But the statute is begotten by war, and is constitutionally excused (i. e. justified) by the war power, which is superior to, and not to be measured by, the police powers of the several states."

In other words, the learned Judge held that Congress, in the exercise of its war power, is not subject to the Fifth amendment and other applicable constitutional limitations. But this is, we submit, clearly in conflict with the doctrine definitely announced by this Court in *Hamilton v. Kentucky Dist. Co.*, 251 U. S. 146, and *Jacob Ruppert v. Caffey*, 251 U. S. 264, and the cases cited in those opinions.

Georgia, Northern District: *United States v. Oglesby Grocery Co.*, 264 Fed., 691; District Judge Sibley, May 6, 1920, on overruling demurrer to indictment. The language of this opinion plainly evidences the fact that the learned District Judge regarded the constitutional objections to the act as exceedingly serious.

Pennsylvania, Western District: *United States v. Rosenblum*, 264 Fed. 578. District Judge Thomson on overruling demurrer to and denying motion

to quash an indictment. As in the case last referred to, the opinion plainly evidences the fact that the learned Judge is beset with doubts. The general rule upon which we rely as to the uncertainty of this statute, is referred to as "incontrovertible"; and the question is said to be "interesting and difficult".

Louisiana, Eastern District: United States v. Russel, 265 Fed. 414. District Judge Foster, May 29, 1920, on overruling demurrers to indictments.

Kennington v. Palmer, District Court for Mississippi (not reported), an equity case similar to the one at bar, is sometimes mentioned as a decision upholding the validity of the statute here in question. But we are informed by the brief of the Solicitor General, in case No. 324 in this Court, that in the Kennington case District Judge Helmes, without passing on the constitutional questions, merely declined to grant an injunction against the enforcement of the law. The Kennington case is now No. 367 on the docket of this Court.

United States v. Myatt (District Court, Eastern District of North Carolina), 264 Fed. 442, and Merritt v. United States (C. C. A. 9th Circuit), 264 Fed. 870, are also sometimes referred to as sustaining the validity of the statutory provisions here in question. Neither do so. In the Myatt case the motion to quash did not attack the validity of the statute, but merely advanced the contention that the act which the indictments described did not fall within its purview, and this contention alone was considered. The opinion is interesting and not inconsistent with our position. In the Merritt case the indictment was based upon Section 6 of the orig-

inal Lever Act, which defines and prohibits "hoarding". The case did not relate at all to amended Section 4. Therefore, it is not in point. Moreover, it does not admit of doubt that the definition of "hoarding" contained in said Section 6 possesses a definiteness and certainty wholly lacking from that portion of Section 4 here under attack.

ARGUMENT.

I.

THE WAR POWERS OF CONGRESS FOR THE PURPOSE HERE ATTEMPTED TO BE EXERTED WERE NOT EXISTENT ON OCTOBER 22, 1919, WHEN THIS ACT WAS PASSED. IN ANY EVENT, THEY TERMINATED AND THE ACT BECAME UNENFORCEABLE LONG PRIOR TO THE TIME TO WHICH THIS SUIT RELATES.

1. *Appellants' Contention Stated.*

It will of course be conceded that, except as an incident to its war powers, Congress was wholly without power to enact the statute here in question. Indeed, on the face of the Lever Act itself (40 Statutes, p. 276), of which the act here in question is an amendment, it is expressly declared in Section 1 "that by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy;" and in Section 24 of said act (40 Statutes, p. 283), it is provided "that the provisions of this act shall cease to be in effect when the existing state of war

between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President."

These declarations make it clearly evident that the original Lever Act, as well as the additional provisions incorporated therein by way of amendment, and which are here under attack, can be justified, if at all, only under the war powers of Congress, and even though valid when enacted, can have continued existence only so long as the situation continues which called the war powers into play.

The war powers of Congress are conferred by Section 8 of Article I of the Constitution of the United States, and particularly the provisions thereof authorizing Congress to "declare war," to "raise and support armies," to "provide and maintain a navy," to "make rules for the government and regulation of the land and naval forces," and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

It is the earnest contention of appellees that on October 22, 1919, the date when the amending act here involved was passed and approved, there existed no situation calling into play the war powers of Congress, and particularly none authorizing or permitting the exercise of such powers in respect to the particular matter which was the subject of said legislation.

But even if this were not so, it is the further contention of appellees, earnestly urged, that since said October 22, 1919, and long prior to the time or any of the times to which this suit relates, such changes in the situation as it then existed had oc-

curred as to render it certain that said war powers had terminated and that said act as amended had inevitably become of no further force or effect. Under such circumstances, to enforce or attempt to enforce said amended act necessarily attributes to Congress a power prohibited by Article X of the amendments to the Constitution.

In this connection we emphasize the language of Section 24 of the Act (40 Statutes, p. 283), as follows:

"That the provisions of this act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President."

This provision for the termination of the act differs from the analogous provisions in all of the other war time legislation which has come under our observation.

For example, the corresponding provision of the War Time Prohibition Act (40 Statutes, pp. 1045, 1046), which was under consideration by this Court in *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, and in *Jacob Ruppert v. Caffey*, 251 U. S. 264, was that the act should be effective "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." So that, as this Court pointed out in the cases cited above, it was plainly the intent of Congress that said act should be effective after the conclusion of the war and until demobilization of the armed forces which had been employed therein

was complete, whereas the act here under consideration by its terms ceases to be effective at the termination of the war itself.

In the course of the opinion in the Kentucky Distilleries case, *supra*, (251 U. S. 165), the court sets forth in a marginal note the provisions fixing the date of expiration of the several war acts. From this tabulation it clearly appears that, with the exception of the Lever Act here in question, and the War Time Prohibition Act referred to above, all of said war acts provided that they should not terminate until the signing or the proclamation of the final treaty of peace or the exchange of ratification thereof.

The different verbiage employed in the act here under consideration is, we submit, significant. It was, we think, plainly the intention of Congress that this act should terminate whenever and as soon as the war was actually over, whereas, in respect to the other acts mentioned above, it appears to have been the intent of Congress that they should remain in effect for some period of time after the actual ending of the war. Doubtless Congress recognized the severity of the act here in question and the serious inroads upon the private rights of citizens which it contemplated, and for that reason wisely provided that it should terminate at the earliest possible date consistent with the purposes for which it had been enacted.

But it is contended that the President has not as yet ascertained and proclaimed the fact and date of the termination of the war in accordance with the provision of Section 24 quoted above. This contention is without basis, in fact, as we shall presently

undertake to show. But even if this were otherwise, the result would be the same. If in fact the war between the United States and Germany has actually terminated, the delay of the President to issue such proclamation cannot prolong or enlarge the powers of Congress or continue in effect a congressional act dependent for its validity solely upon the war powers of Congress, when those powers have actually ceased to exist. That which causes and permits the war powers to function is war itself, and not failure or neglect to issue an executive proclamation. This must be so, because if it were otherwise and this country should be cursed with an evil-minded chief executive, or one neglectful of, or detestful to, the performance of his official duties, such proclamation might never be issued, its issuance could not in any way be enforced, and arbitrary powers intended only for war purposes, as well as legislation occupying the whole field of the powers reserved to the states, might be continued indefinitely. It admits of no doubt that such a result is, under the federal constitution, not permissible.

If, therefore, Section 24 of the Lever Act had expressly provided that it should remain in effect until the date of the issuance of a presidential proclamation announcing the termination of the war, it would, we submit, be necessary for this Court to hold such provision invalid, and to further hold that in spite of it the act terminated when the war ceased, even though no proclamation had been issued. But Section 24 of the Lever Act contains no such provision. The provision is that the Act shall cease to be effective when the war "shall have terminated." The further provision requiring the fact and date of such

termination to be ascertained and proclaimed by the President is mandatory, but it is not expressed as a condition prerequisite to the termination of the act. Doubtless the provision imposes a duty upon the President to issue such proclamation. But he may delay or even wholly fail to perform such duty, and of course its performance cannot be enforced. What the President is to ascertain and proclaim is "the fact and date of such termination" of the war. The date so ascertained and proclaimed may not correspond with the date of the proclamation. As the language clearly indicates, such difference in dates was certainly contemplated. If such formal proclamation with express reference to this act of Congress should now be issued, it would, we submit, be necessary that the date of the termination of the war as therein stated should be November 11, 1918. But, as we have said, it is the date of the termination of the war and not the date of the issuance of the proclamation, which, under the express language of this act, controls.

The construction of Section 24 of the Act hereinabove set forth is, we submit, the correct one. It results from giving to the words employed their natural meaning, and to the punctuation used its logical effect. It is, to say the least, a permissible construction. This being so, it is, we submit, the duty of the court to adopt it; for, as we have already shown, if the provision were construed as one permitting the President, by the mere failure to issue a formal proclamation, to prolong the effectiveness of the act after the actual termination of the war, it would be unconstitutional. The rule in such cases is well settled.

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter."

United States v. Delaware & Hudson Co., 213 U. S. 366, 408.

"A statute having such a result may incur the opposition of the constitution. When such may be the result, a different construction of the statute is determined."

Union Pacific v. Laramie Stockyards, 231 U. S. 190, 200.

To the same effect:

Union Pacific v. Snow, 231 U. S. 204, 212, 213.

Harriman v. Interstate Commerce Commission, 211 U. S. 407.

It follows, we think, inevitably that the power of Congress to enact and the power of the executive department to enforce the statute here in question ceased at the moment when the war between the United States and Germany terminated, without regard to whether the President has or has not as yet ascertained or proclaimed the fact and date of such termination.

2. *Legislative History of the Act here Involved.*

The original Lever Act was approved August 10, 1917, within a few months after the entry of this country into the war, and stood without amendment until October 22, 1919.

As already stated, its operation was confined to

food products and fuel. Wearing apparel was not within its purview. Moreover, Section 4 of the original act contained no penalty clause, and it was plainly the intent of Congress that only those things should be punishable offenses which were dealt with by other sections of the act.

This remained the condition throughout the whole period of actual hostilities and for nearly a year thereafter.

On October 22, 1919, Congress passed and the President approved the amendatory act here in question. This was done in response to a special message of the President delivered to Congress on August 8, 1919 (Congressional Record, Vol. 58, p. 3961, *et seq.*).

This message dealt solely with the high cost of living and the resultant hardship to the citizens of this country. It made no reference whatever to any war emergency. It did not indicate in any way that legislation was needed for the purpose of conducting, carrying out or rendering effective any of the things which Congress had the right to do in the exercise of its war powers. On the contrary, the recommendation was (Congressional Record, Vol. 58, p. 3963) for permanent legislation under the interstate commerce power. The Lever Act was referred to as something merely temporary and of very short duration. As a temporary measure it was, however, suggested that by act of Congress its effective period be extended, its provisions against hoarding made to apply to clothing and other necessities of life, and that additional penalties for its violation be provided.

Congress did not comply with the recommendations of the President relative to permanent legis-

lation, nor with that relating to extending the effective period of the Lever Act. It did, however, enact the legislation which is here under attack.

On August 21, 1919 (Congressional Record, Vol. 58, p. 4140), the Committee on Agriculture, through its chairman, Mr. Haugen, reported to the House of Representatives certain amendments to the Lever Act (H. R., 8624), which now constitute Title I of "The Food Control and the District of Columbia Rents Act" (41 Statutes, pp. 297, 298).

The debate in the house is interesting (Congressional Record, Vol. 58, pp. 4183 to 4228). Serious doubt was expressed as to the validity of the proposed legislation and as to the power of Congress to enact it. But in the course of the debate Mr. Haugen, chairman of the committee which had reported the bill, and its principal sponsor, expressly stated (p. 4206) that it was merely a temporary measure, that its life would in any event be exceedingly brief, and that it could not remain effective more than two or three months at the most. Under these circumstances the bill was passed and sent to the Senate.

In the Senate the bill was at once amended by changing its name to the title which it now bears, as quoted above, and by adding thereto Title II relating to District of Columbia rents (41 Statute, 298 *et seq.*). Title I with which we are concerned, consisted of three relatively short sections. Title II, relating to rents in the District of Columbia, consisted of twenty-two sections, composed the major part of the bill as it passed the Senate and was ultimately enacted, and provided an elaborate system for regulating rents in the District of Columbia in

a way quite similar to that by which railroad rates are regulated by the Interstate Commerce Commission.

The debate in the Senate (Congressional Record, Vol. 58, pp. 5157 to 5168, 5225 to 5232, 5236, 5294 and 5303), was largely devoted to that part of the bill concerning District of Columbia rents. As to that portion of the bill with which we are here concerned, in the Senate as in the House grave doubt was expressed concerning its validity and the power of Congress to enact it, but it was recognized and emphasized that the legislation was in any event of the most temporary character, that even though valid and within the power of Congress to enact, it could not endure except for an exceedingly brief period, and so the bill was passed.

It went to conference, after some delay the conference report was agreed to in both houses, and the bill was on October 21st finally enacted and signed by the President on October 22nd.

The significance of this legislative history is, that the statute was enacted not as a war measure but as a measure for the relief of citizens in times of peace; that it was passed in response to an urgent message of the President concerning the high cost of living in this country; that Congress definitely declined to follow the recommendation of the President for permanent legislation of this sort; that the gravest doubt existed as to the validity of the legislation and the power of Congress at that time to enact it; and that it was enacted in spite of said doubts solely and only because its duration could in any event be very short, not to exceed two or three months at the most.

It does not admit of doubt that the legislation never would have been enacted if Congress had foreseen that six months and even a year after the date of its enactment the executive department would be enforcing its stringent provisions actively and vigorously and as though they were still in effect.

A year has now elapsed since this statute was passed. The efforts of the department of justice to enforce it are more vigorous now than they have been at any time since its enactment. Apparently, it is regarded and dealt with by that department as permanent legislation. There is nothing to indicate that these efforts to enforce the act will be at any time in the future diminished or relaxed, unless and until this Court by definite pronouncement shall terminate the same.

3. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, and *Jacob Ruppert v. Caffey*, 251 U. S. 264 *Analyzed and the Principles thereby Enunciated Applied*.

We are, of course, mindful of the two recent decision of this Court mentioned in the foregoing headline. The war time legislation there under consideration was sustained as being still effective at the date to which those decisions related. But the principles, conclusively established and clearly enunciated in those opinions, applied to the situation presented by this record make it certain, we think, that the legislation here involved cannot be upheld.

The Kentucky Distilleries case related to the War Time Prohibition Act of November 21, 1918 (40 Statutes 1046). The contention was that at the date to which said suit related the act in question

had ceased to be effective because of the passing of the emergency which had justified its enactment. The suit was begun October 10, 1919, the appeal was argued in this Court November 20, 1919, and the decision was announced December 15, 1919.

The Jacob Ruppert case likewise related to the War Time Prohibition Act, and particularly to the amendment thereto affected by Section 1, Title I of the "National Prohibition Act," commonly referred to as the Volstead Act (41 Statutes, 305), approved October 28, 1919. The contention was that at the date of the enactment of said amendment the War Time Prohibition Act had ceased to be effective because of the passing of the emergency, and that therefore Congress was without power to enact the amendatory statute. The suit was begun shortly after October 28, 1919, the appeal was argued in this Court on November 20th and 21st, 1919, and the decision was announced on January 5, 1920.

As we have already pointed out, the War Time Prohibition Act provided (40 Statute, 1046) that it should be effective "*until the conclusion of the present war and thereafter until the termination of demobilization,*" whereas the Lever Act here involved was by its terms to cease to be effective "*when the existing state of war between the United States and Germany shall have terminated*" (40 Statutes, 283).

The War Time Prohibition Act was passed ten days after the armistice was signed, at a time when millions of our expeditionary forces were on foreign soil and their demobilization had not even commenced, whereas the act here in question was passed nearly a year thereafter and after the happening of all of the events presently to be noticed.

No one can successfully question the right of Congress under its war powers to legislate concerning the demobilization of such military and naval forces as this nation employed in the late war. No one can successfully question that such legislation may and should remain in effect until the demobilization is complete. And no one can successfully question the wisdom of Congress in determining that the prohibition of the liquor business is an aid to successful demobilization of such large bodies of troops, and as was held by the majority of this Court in the *Jacob Ruppert* case, no one can question the wisdom of Congress in seeking to make that prohibition effective by the supplemental and amendatory legislation there involved.

The crucial question, therefore, presented by the *Kentucky Distilleries* case and the *Jacob Ruppert* case was whether or not, at the date to which those suits related, demobilization was actually complete. And upon evidence which seemed convincing this Court expressly found (251 U. S. 168) that as late as November 11, 1919, demobilization was not complete but still continued.

But the situation presented in the case at bar is altogether different. The legislation here involved was not enacted as an aid to demobilization. On the contrary, its effectiveness was to cease as soon as war terminated. If in fact the war had terminated prior to October 22, 1919, when this statute was enacted, Congress was then without power to so legislate, the statute is invalid, and the decisions of this Court above referred to do not determine otherwise even as to said date.

But between the date to which those decisions

relate and the date when this suit was filed six months elapsed, and nearly a year has now expired. During those periods events have occurred which render it certain that even though the war powers of Congress sufficiently existed on October 22, 1919, to justify the enactment on that date of the statute here in question, they have long since expired and with their expiration the statute has ceased to be effective.

The distinction between the question presented to this Court in the *Kentucky Distilleries* and *Jacob Ruppert* cases and that presented in the case at bar is therefore clear. In addition to the points of distinction already mentioned, we refer to the following:

In those cases the subject dealt with was intoxicating liquors. Here it is wearing apparel. The distinction between the powers of Congress to regulate and even to prohibit such things as intoxicating liquor, the evil tendencies of which are obvious and well-known, and its powers in that regard respecting such a business as that of dealing at retail in wearing apparel, is clear and has many times been stated. As was said by this Court in *Wilson v. New*, 243 U. S. 332, 347:

"This is illustrated by the difference between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry goods and other commodities."

See also:

Mugler v. Kansas, 123 U. S. 623;
Stone v. Mississippi, 101 U. S. 814;
The Lottery Cases, 188 U. S. 321;

**McKinley v. United States, 249 U. S.
397.**

Moreover, at the time when the Kentucky Distilleries and the Jacob Ruppert cases were decided, it was evident to the court that the war legislation which it then upheld could be in any event of very brief duration and the date of its termination was definitely fixed. The Eighteenth Amendment establishing national prohibition had been ratified and was to become effective on January 15, 1920. At that date the War Time Prohibition Act and the Volstead Act, insofar as it was an amendment thereto, would in any event cease to be effective and be replaced by national prohibition brought about through constitutional amendment, not enacted under the war powers. As we have already pointed out, there was an express finding by this Court that the demobilization to which the War Time Prohibition Act referred still continued as late as November 11, 1919 (25 U. S. 168). The decision in the Kentucky Distilleries case was announced December 15, 1919, just one month prior to the effective date of the Eighteenth Amendment, and the decision in the Jacob Ruppert case was announced on January 5, 1920, ten days prior to such effective date. Therefore, the real question presented for decision was whether or not the liquor business should be relieved of the restrictions imposed by those acts, when, in the one case, the relief could not exceed a period of more than thirty days, and in the other a period of ten days, and when, as the court could plainly see, at the expiration of those respective periods nationwide prohibition was to become effective. Upon the

facts presented in those cases the court determined that this brief interregnum should not be decreed.

But how different is the situation now presented to the Court. This case relates, not to a business of well-known evil tendencies like the liquor business, but to the business of dealing at retail in wearing apparel, which is not only innocent in character but highly commendable and one to be encouraged in every possible way.

And in the case at bar the drastic and intolerable provisions of the statute involved are, if the contentions of appellant should be upheld, still in force and will remain in force for an indefinite period hereafter, although the war actually ended nearly two years ago, and although all other activities of the national government inaugurated under its war time powers have long since terminated.

The distinction between the *Kentucky Distilleries* and *Jacob Ruppert* cases and the one at bar is therefore clear. And the fact that the legislation there involved was upheld as a proper exercise of the war powers by no means indicates that that here involved, under the facts now presented, should be so upheld. Quite the contrary is true. For by the application of the principles, clearly enunciated and conclusively established in those decisions, to the facts now presented, a decision that the statute here involved is, and at all of the times to which this suit relates was, invalid is, we think, imperatively required.

The principles established by these decisions and upon which we rely are these:

(a) The implied power to enact such legislation must depend upon some actual emergency or

necessity arising out of the war or incident to it (251 U. S. 161).

(b) A statute valid when enacted may cease to have validity owing to a change of circumstances, so that a statute even though at the time of its enactment a valid exercise of the war powers then existent, may no longer be in force when the facts which called those powers into play cease to exist (251 U. S. 162).

(c) The question as to whether at the time of the enactment of a particular statute in the avowed exercise of the war powers, facts existed which justified the exertion of those powers in the particular manner attempted, and the further question as to whether thereafter, and if so when, the facts which justified the original exertion of the war powers have ceased to exist, are justiciable questions the final determination of which must rest with the courts (251 U. S. 163).

That we are correct in the foregoing statement as to the effect of the decision in the *Kentucky Distilleries* case is evident, not only from the portions of the opinion to which reference has been made, but also by the statement in respect thereto contained in the dissenting opinion in the *Jacob Ruppert* case (251 U. S. 308), as follows:

"By considering the circumstances existing when the War Time Prohibition Act was challenged, in order to reach the conclusion announced in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, *supra*, this court asserted its right to determine the relationship between such an enactment and the conduct of the war; the decision there

really turned upon an appreciation of the facts. And that the implied power to enact such a prohibitive statute does not spring from a mere technical state of war, but depends upon some existing necessity directly related to actual warfare, was recognized." (Italics ours.)

This characterization of the prior opinion of the court in the Kentucky Distilleries case was, in the prevailing opinion in the Jacob Ruppert case, in no wise questioned. It must, therefore, we think, be accepted as correct. And so accepted and applied to the case at bar, these prior decisions are decisive of the present controversy and require the affirmance of the decree below.

4. *Changes in the Situation Which Have Occurred since October 22, 1919, the Date of the Enactment of the Statute Here Involved, and Since the Decisions of this Court in Hamilton vs. Kentucky Distilleries Co., supra, and Jacob Ruppert vs. Caffey, supra.*

As we have already pointed out, the decisions in the Kentucky Distilleries case and in the Jacob Ruppert case turned upon the question as to whether demobilization was then complete. It was found as a fact that it was not, and as a consequence, the continued validity of the statute there in question was decreed. But as we have also already pointed out, that is not the test in the case at bar. Here the crucial question is, when did the war terminate? It is our earnest contention that such termination occurred prior to October 22nd, 1919, the date of the amendatory act here involved. But even if this were

not so, and if at the date of such amendatory act there still remained some vestige of a war already concluded, sufficient to justify the exercise of the war power in the manner in which it was then attempted to be exerted, we submit with the utmost confidence that the tenuous thread, if any, which then upheld federal power in that regard has long since diminished to nothingness and wholly disappeared.

The facts hereinafter stated are derived from the agreed statement of facts filed herein (Record, p. 35, et seq.) and from matters of which this Court may take judicial notice.

The armistice was signed on November 11, 1918. At that time actual hostilities ceased and have not since been resumed (Record, p. 35).

On December 2, 1918, the President, in his address to Congress, among other things, said (Record, p. 40):

"While the war lasted we set up many agencies by which to direct the industries of the country in the services it was necessary for them to render * * * by which in short to put every material energy of the country in harness to draw the common load and make of us one team in the accomplishment of a great task. But the moment we knew the armistice to have been signed we took the harness off * * *. It has not been possible to remove so readily or so quickly the control of food stuffs and of shipping because the world has still to be fed from our granaries and the ships are still needed to send supplies to our men overseas and to bring the men back as fast as the disturbed conditions on the other side of the water permit; but even these restraints

are being released as much as possible and more and more as the weeks go by * * *. It has been the policy of the Executive, therefore, since the armistice was assured (which is in effect a complete submission of the enemy) to put the knowledge of these bodies (certain governmental agencies) at the disposal of the business men of the country and to offer their intelligent mediation at every point and in every matter where it was desired. It is surprising how fast the process of return to a peace footing has moved in the three weeks since the fighting stopped. It promises to outrun any inquiry that may be instituted and any aid that may be offered. It will not be easy to direct it any better than it will direct itself. The American business man is of quick initiative."

By October 22, 1919 (Record, p. 41), the process of return to a peace footing referred to by the President in that portion of his message quoted above had so far progressed that the situation was substantially as stated by this Court in *Hamilton vs. Kentucky Distilleries Co.*, 251 U. S. 146, at 159 (and in the official documents and other publications referred to in the foot notes at the bottom of said page), as follows:

"There are statements of the President to the effect that the war is ended and peace has come; that certain war agencies and activities should be discontinued; that our enemies are impotent to renew hostilities, and that the object of the act here in question have been satisfied in the demobilization of the army and navy. It is shown that many war time activities have been suspended; that vast quantities of war

materials have been disposed of; that trade with Germany has been resumed; and that the censorship of postal, telegraphic and wire communications has been removed."

To this may be added that on August 1, 1919, the telegraph and telephone lines of the country, which had theretofore been taken into the possession, operation and control of the United States government, had been surrendered to and thereafter did and still do remain in the possession, operation and control of their owners (Record, p. 41).

So far as concerned restraints upon or attempted regulation of business, the fact was, as is conclusively shown by the agreed statement of facts herein (Record, p. 41), that on October 22, 1919, except as to coal, sugar and its related products, and wheat and its products (the facts in respect to each of which are set forth in the following paragraphs), there existed no regulation of or attempt to regulate by the federal government or any of its agencies, the price, production or distribution in this country of any commodity except intoxicating liquor, and except as Congress had, in the exercise of its power over interstate commerce, imposed or caused to be imposed certain regulations relative to articles moving therein. With the exceptions aforesaid, the regulations which had theretofore, after the declaration of war with Germany, been put in effect, had prior to said date been removed. On and after said October 22, 1919, except in the case of coal, sugar, and its related products, wheat and its products (the facts in respect to which are set forth in the following paragraphs), and intoxicating liquors (the

facts in respect to which are matters of public record and have hereinabove been discussed), there did not and there does not now exist any such war time regulation or attempt to regulate, except as the efforts of the Department of Justice to enforce Section 4 of the original Lever Act, as amended by Section 2 of the Act of October 22, 1919, might be designated as such regulation or attempt to regulate.

In *Hamilton vs. Kentucky Distilleries Co.*, *supra*, the learned writer of the opinion, in support of the argument that at the date to which said decision related demobilization was not complete, and that there still continued such war time activities as justified the continued validity and enforceability of the statute there in question, set forth specifically and in detail the facts then existing from which the inference was drawn. In the paragraphs which follow we quote separately and seriatim these statements of the Court, and in connection with each direct attention to the changes which have since occurred. The quotations are from 251 U. S. p. 160.

(a) "That * * * Congress, on October 28, 1919, passed over the President's veto the National Prohibition Act, which in making further provision for the administration of the War Time Prohibition Act, treats the war as continuing and demobilization as incomplete." This point has already been sufficiently dealt with in the foregoing analysis of the decisions in the *Kentucky Distilleries* and *Jacob Rupert* cases. The effectiveness of the War Time Prohibition Act, including the amendment thereto made by the National Prohibition Act, in any event terminated on January 15, 1920, when the Eighteenth Amendment took effect, and since that date there

has been no regulation or prohibition of the liquor traffic by virtue of the war powers. So far as concerns demobilization, it does not admit of doubt that it was wholly complete long prior to the filing of the bill in this case. This conclusively appears from the agreed statement of facts herein (Record, p. 39).

(b) "That the Senate, on November 19, 1919, refused to ratify the treaty of peace with Germany." This situation remains unchanged. The treaty has not yet been ratified by the Senate. It failed of ratification again on March 19, 1920, when it was returned to the President, with whom it has since remained (Record, p. 37). The significance of this situation and its bearing on the solution of the question here presented is hereinafter separately discussed.

(c) "That under the provisions of the Lever Act the President resumed, on October 30, 1919, the control of the fuel supply, which he had relinquished partly on January 31, 1919, and partly on February 20, 1919." The facts in respect to this matter and the subsequent developments relating thereto are thus set forth in the agreed statement of facts (Record, p. 42):

"After the Armistice on November 11, 1918, the various orders which had theretofore been issued by the United States Fuel Administration were gradually modified or suspended. Finally, on January 31, 1919, all prices and regulations were suspended, with the following exceptions:

(a) Regulation relative to the making of contracts dated January 17, 1919, requiring that every contract should pro-

vide that the prices named would be subject to revision if prices were again fixed and that every contract would be subject to cancellation by the Fuel Administrator and subject to requisition, including under this term the right to divert.

(b) An order continuing the tide-water pool.

(c) Regulation reserving all powers of the Fuel Administrator.

(d) An order prohibiting the shipment of coal for reconsignment.

After issuing the order of January 31, 1919, Dr. Garfield, the fuel administrator, placed his resignation in the hands of the President, but it was not accepted. The Fuel Administration disintegrated, and on June 30, 1919, the appropriation for its expenses having lapsed, the disintegration became complete. Prior to June 30th the Fuel Administration requested an allotment of funds by the President for the purpose of enabling the enforcement division to continue its work in the absence of congressional appropriation, but the President was advised that this was beyond his power, and the allotment was not made. On June 30, 1919, therefore, the Fuel Administration was completely disbanded, its funds exhausted, and there was no agency in existence to exercise its powers. This situation continued until October 30, 1919.

In October, 1919, a coal miners' strike was threatened by union miners which would affect a large number of the bituminous coal mines of the country. This strike was expected to commence November 1, 1919. On October 30, 1919, the

President issued an Executive order, which revoked the suspension of January 31, 1919, to the extent necessary to restore all bituminous coal prices and margins, and giving the Fuel Administration power to restore any other regulations. Dr. Garfield, the fuel administrator, was recalled from Massachusetts and opened an office in his hotel rooms in Washington as fuel administrator. He had, however, no funds of any kind, no appropriation having been made for fuel administrator, and, with the exception of a few assistants, he relied upon the Railroad Administration to carry out his orders. Thereafter the fuel administrator issued certain other orders establishing temporary regulations relating to bituminous coal.

The Fuel Administrator continued in office until about December 13, 1919, when he resigned and no one has been appointed to take his place. When he left Washington his two assistants also left and the Fuel Administration again came to an end.

In a report dated February 23, 1920, to the President of the Senate, the Director General of Railroads says that the Executive order of October 30, 1919, mentioned above, was issued "in anticipation of a strike of bituminous coal miners expected to commence November 1, 1919."

On December 19, 1919, the President appointed a commission to settle the then pending coal strike. On March 10, 1920, the Commission, to which reference has been made, filed its report with the President.

On March 19, 1920, the President, by letter addressed to the operators and

miners and made public by him, transmitted a printed copy of the commission's report. The commission had no power to interfere with the selling price of coal nor did it undertake to do so or make any recommendations in connection therewith. But the President in the letter transmitting the report to the operators employed, in part, the following language:

'I have carefully considered the question whether the war power of the Lever Act should be temporarily invoked by me despite the absence of any action of the commission so recommending to continue temporarily the control of prices and have concluded that it is not expedient for me to exercise any such price-fixing control so that on and after April 1, 1920, no Government maximum prices will be enforced. There is at present no provision of law for fixing new coal prices for peace time purposes and unless and until some grave emergency shall arise which in my judgment has a relation to the emergency purposes of the Lever Act, I would not feel justified in fixing coal prices with reference to future conditions of production.

* * * I am sure the public fully appreciates the desirability where practicable of leaving commercial transactions untrammelled, but at the same time I am satisfied the public will find ways to protect itself if such liberal policy shall appear to result in unreasonably high prices.'

Since April 1, 1920, there has not existed nor does there now exist any Government regulation whatsoever relating to the price, production or distribution of coal."

The resumption of these powers by the President on October 20, 1919, for the purpose of resisting a strike of coal miners in this country is, as it seems to us, certainly no evidence of a continuance of the war with Germany. But without now discussing the legal validity of that action, the fact still remains that long prior to the filing of the bill in this case every vestige of control had been relinquished and the President had definitely announced that no emergency longer existed justifying the exercise of the war powers under the Lever Act.

(d) "That he (the President) is still operating the railroads, of which control had been taken as a war measure; and that on November 18, 1919, he vetoed Senate Bill 641 because it diminished that control." The facts in respect to this matter and the developments which have since occurred are thus set forth in the agreed statement of facts herein (Record, p. 46) :

"On December 2nd, 1918, the President, in his address to Congress, among other things said:

"The question which causes me the greatest concern is the question of the policy to be adopted towards the railroads. I frankly turn to you for council upon it. I have no confident judgment of my own. * * * It was necessary that the administration of the railways should be taken over by the Government so long as the war lasted.* * * But all these necessities have now been served, and the question is what is best for the railroads and for the public in the future. * * * Let me say at once that I have no answer ready. The only thing that is

perfectly clear to me is that it is not fair either to the public or to the owners of the railroads to leave the question unanswered, and that it will presently become my duty to relinquish control of the roads even before the expiration of the statutory period unless there should appear some clear prospect in the meantime of a legislative solution. Their release would at least produce one element of a solution, namely, certainty and a quick stimulation of private initiative. * * *

I hope that the Congress will have a complete and impartial study of the whole problem instituted at once and prosecute it as rapidly as possible. I stand ready and anxious to release the roads from the present control, and I must do so at a very early date, for by waiting until the statutory limit of time is reached I shall be merely prolonging the period of doubt and uncertainty which is hurtful to every interest concerned.

Prior to October 22nd, the President had by public announcement indicated that he would relinquish control of the railroads and return them to their owners on December 31st, 1919. However, as this date approached, and it became evident that Congress would not by that time have completed the remedial legislation for the relief of the railroads under private control and operation, the President postponed the date and by proclamation issued December 24th, 1919, (Congressional Record, Feb. 28, 1920, p. 3914), did ordain and proclaim in part as follows:

'Whereas I now deem it needful and desirable that all railroads, systems of

transportation, and property now under such Federal control be relinquished therefrom:

Now, therefore, under authority of Section 14 of the Federal control act approved March 21, 1918, and of all other powers and provisions of law thereto enabling, I, Woodrow Wilson, President of the United States, do hereby relinquish from Federal control, effective the first day of March, 1920, at 12:01 o'clock a. m., all railroads, systems of transportation, and property of whatever kind taken or held under such Federal control and not heretofore relinquished, and restore the same to the possession and control of their respective owners."

Pursuant to said proclamation all of said railroads and systems of transportation were on the date and at the hour specified therein relinquished from Federal possession, control and operation, and returned to their respective owners by whom they have since been and are now being possessed, controlled and operated."

(c) "That pursuant to the act of March 4, 1919, c. 125, 40 Stat., 1318, he (the President) continues to control, by means of the Food Administration Grain Corporation, the supply of grain and wheat flour." The facts in respect to this matter, and the developments which have since occurred, are thus set forth in the agreed statement of facts herein (Record, p. 45):

"On October 22, 1919, there existed no governmentally fixed price for wheat or its products nor any government regulation

or attempt to regulate the price, production or distribution of wheat except as the acts of the Food Administration Grain Corporation, hereinafter mentioned, affected the same. The regulations concerning price, production and distribution of wheat and its products which after the declaration of war with Germany had by agencies of the Federal government been made, had prior to said October 22nd, 1919, with the exception mentioned, been withdrawn.

The Food Administration Grain Corporation was one of the agencies which had been employed by the President of the United States pursuant to the Lever Act. Acting under said Lever Act, the President had made certain guarantees to producers of wheat of the crops of 1918 and 1919, by two proclamations dated respectively February 21, 1918, and September 2, 1918, issued pursuant to Section 14 of said Lever Act. By Act of Congress approved March 4, 1919, entitled 'An act to enable the President to carry out the price guarantees made to producers of wheat of the crops of 1918 and 1919 and to protect the United States against undue enhancement of its liabilities thereunder' the President was specifically authorized to do certain things for the purposes mentioned in said title. To accomplish this the President made use of the agency of the Food Administration Grain Corporation, and on October 22, 1919, for some time prior thereto, and at all times thereafter, its activities were confined exclusively to dealing with wheat crops of 1918 and 1919 and the product thereof. To this end it fixed a minimum price, to-wit, the price which the

President had guaranteed to the farmers for wheat of said crops and required millers and other purchasers of wheat of said crops to pay therefor not less than said minimum price. These requirements, were made effective by contracts between said Food Administration Grain Corporation and the purchasers and millers of wheat throughout the country.

These activities of the Food Administration Grain Corporation have been and are wholly under and pursuant to said Act of March 4, 1919, and have related and do relate solely to wheat of the crops of 1918 and 1919.

Except as aforesaid, there has not since October 22, 1919, existed, nor does there now exist, any Government regulation whatsoever of the price, production or distribution of wheat or its products."

The Act of March 4, 1919, referred to above (40 Statutes, 1318), was, as is declared upon its face, passed for the purpose, not of regulating and reducing prices to the consumer, but for the purpose of protecting the United States against loss under the guaranties of wheat prices for the crops of 1918 and 1919, which guaranties had theretofore been made by the President pursuant to the provisions of the Lever Act. Its operation was confined to the crops of the years mentioned, and by Section 11 of the Act it was expressly provided, "That the provisions of this act shall cease to be in effect whenever the President shall find that the emergency growing out of the war with Germany has passed and that the further execution of the provisions of this act is no

longer necessary for its purposes, the date of which termination shall be ascertained and proclaimed by the President; but the date when this act shall cease to be in effect shall not be later than the first day of June, 1929."

On November 21, 1919, the President issued a proclamation (261 Fed. Pamphlet No. 3, Supplement, p. 139) referring to this act of Congress and reciting that "conditions relating to the necessity of maintaining an import and export embargo on wheat and wheat flour for the purposes above stated have changed," and therefore ordering and directing "that such prohibitions and limitations on the importation and exportation of wheat and wheat flour be discontinued and cancelled, effective December 15, 1919."

(f) "That through the United States Sugar Equalization Board, Inc., he (the President), still regulates the price of sugar." The facts in respect to this matter and the developments which have since occurred are thus set forth in the agreed statement of facts herein (Record, p. 44):

"On October 22, 1919, there existed no governmentally fixed price for sugar or its related products, nor any government regulation or attempt to regulate the price, production or distribution of sugar, except as the acts of the United States Sugar Equalization Board, hereinafter mentioned, affected the same. The regulations concerning price, production, and distribution of sugar and its related products which after the declaration of war with Germany had by agencies of the Federal Government been made, had prior to said October 22, 1919,

with the exception mentioned, been withdrawn.

The United States Sugar Equalization Board Incorporated, was one of the agencies which had been employed by the President of the United States, pursuant to the Lever Act. On October 22, 1919, its activities were limited to purchasing and carrying sugar and its related products of the crops which preceded that coming into the market in the fall of 1919 and the winter of 1920. It wholly ceased to function on November 1, 1919, and since said date has done nothing whatsoever. Although by an act of Congress approved December 31, 1919, said United States Sugar Equalization Board was continued for the limited period and the express purpose therein mentioned, it has done nothing whatsoever thereunder and the provision of said act is that 'It shall expire as to the domestic product June 30, 1920.' The purchases of sugar and its related products of the crops preceding that of the fall of 1919 and winter of 1920 (which were the only purchases made by it) were for the declared purpose of stabilizing the market in respect to sugar and its related products of those particular crops.

Since October 22, 1919, there has not existed, nor does there now exist any government regulation whatsoever of the price, production, or distribution of sugar or its related products."

The act of Congress of December 31, 1919 (41 Stat. —, F. S. A. 1919 Sup., p. 61), hereinabove referred to, is worthy of note. It expressly provided that "the provisions of this act shall expire as to

the domestic product June 30, 1920;" that "the zone system of sale and distribution of sugars heretofore established by the said United States Sugar Equalization Board shall be abolished and shall not be re-established or maintained, and that sugars shall be permitted to be sold and to circulate freely in every portion of the United States;" and that all provisions of the act should in any event expire not later than December 31, 1920. Moreover, the act did not require but merely authorized the President to continue the United States Sugar Equalization Board for the purposes therein specified "if found necessary for the public good," and as is shown by the agreed statement of facts herein, such action was evidently found by the President to be unnecessary, for nothing whatever was done under this statute and the United States Sugar Equalization Board was allowed to lapse.

(g) "That in his message to Congress on December 2, 1919, he (the President) urgently recommended the further extension for six months of the powers of the Food Administration." If this recommendation had been acted upon, said extension would have expired long since. But in fact Congress did nothing in response to this recommendation except to enact the statute of December 31, 1919, relating to the United States Sugar Equalization Board, the facts in respect to which are set forth in the last preceding paragraph.

(h) "That as Commander-in-Chief, he (the President), still keeps a part of the army in enemy occupied territory and another part in Siberia." The facts in respect to this matter and the developments which have since occurred are thus set forth

in the agreed statement of facts herein (Record, p. 39):

"Prior to October 22, 1919, the armed forces of the United States which had been raised for the war emergency had been returned to this country and demobilized; the former members thereof returned to civil life; the Army and Navy of the United States reduced to a peace basis and all armed forces theretofore in foreign lands withdrawn therefrom except that there remained a small force in eastern Siberia and a relatively small force in the Coblenz area in Germany. The facts, in respect to said forces in Siberia and Germany, being set forth in the following paragraphs:

As to the force in Siberia. In 1918 this country sent to eastern Siberia a relatively small force, which in September, 1918, reached its maximum strength of 255 officers and 7,267 men. During the summer of 1919 this force was being withdrawn and returned to the United States as rapidly as was practicable, and by October 22, 1919, a considerable portion thereof had been so withdrawn and returned. Prior to December 31, 1919, nearly all of said force had been so withdrawn and returned, and about March 1, 1920, the last of said force had been withdrawn and returned to the United States, and there has not been, and is not now, any part of the Army of the United States in Siberia.

As to the force in Germany. On October 22, 1919, there was and there has since remained in Germany a relatively small force at or near the bridgehead of Coblenz. Said force on said date and since

has been and is in number approximately what it was on March 30, 1920, as hereinafter stated. The facts in respect to said force in Germany are as set forth in a statement of the Honorable Julius Kahn, chairman of the committee of the House of Representatives on Military Affairs, to-wit:

'At present our forces continue in the occupied areas, under the terms of the armistice of November 11, 1918, and the subsequent continuations thereof agreed to by ourselves, the Allied Powers, and the Germans * * *. On March 30, 1920, the strength of our force in Germany was a total of 17,455. The English troops are at the bridgehead of Cologne and its vicinity; the American troops are at the bridgehead of Coblenz; the French troops are at the bridgehead of Mayence. Under the terms of the treaty, the Cologne bridgehead is to be evacuated in five years, if Germany keeps its agreement faithfully in the treaty; the Coblenz bridgehead is to be evacuated in ten years if the conditions of the treaty are faithfully performed by Germany; the Mayence bridgehead is to be evacuated in fifteen years if all the conditions and terms of the treaty are complied with by Germany.'

Further as to said force in Germany, the President, on March 29, 1920, (Congressional Record, April 1, 1920, page 5496) in response to a request of the House of Representatives for information regarding the same, reported in part as follows:

'The American forces in Germany on March 26 were reported to comprise 726 officers and 16,756 enlisted men. These forces are stationed principally in the

Coblenz area, the exact location of the units being set forth on the accompanying map. They are occupying that territory under the armistice agreement which with its annexes and conventions was transmitted by me to the Senate and published as Senate Document 147, Sixty-sixth Congress, first session. The paragraph specifically covering this occupation is Paragraph V of the clauses relating to the western front. * * * The American forces in Germany are at present operating under the terms of the original armistice and the subsequent conventions prolonging the armistice * * *. Upon the ratification of the treaty of peace by the Allied Powers, an inter-allied Rhineland High Commission was organized in the manner set forth in the message from the President of the United States to the Senate, containing the agreement between the allied and associated powers and Germany, with regard to the military occupation of the territories of the Rhine. The document is published as Senate Document 81, Sixty-sixth Congress, first session. This commission having been organized and having formulated ordinances for the zone of occupation, the question arose as to whether these ordinances should govern in the American sector and the representatives of the State Department and the commanding general of the American force in Germany, were instructed as follows: 'This Government can not admit jurisdiction of that commission over portion of Rhinish provinces occupied by the American force, etc.'

Between the date of the armistice and March 22, 1920 (U. S. Bulletin of that

date, page 275) approximately 2,500 officers have resigned from the Regular Army; their resignations have been accepted and they have gone into civilian life."

(i) "That he (the President) has refrained from issuing the proclamation declaring the termination of demobilization for which this act provides." But, as we have already pointed out, the act here in question did not relate in any way to demobilization, and therefore, of course, there was no provision for a proclamation declaring its termination. That the provision of Section 24 of the Lever Act concerning a proclamation by the President was not intended to and could not be a requirement upon the performance of which the termination of the act depended has, we submit, already been demonstrated (*supra*, I, paragraph 1). The question is, has the war in fact terminated, and we submit that it has.

But even if a presidential proclamation had been necessary declaring the termination of the war, it has been issued, as we shall presently show.

From the foregoing review it appears upon conceded facts, and others which cannot be disputed, that except for the circumstance that the treaty with Germany has not yet been ratified by the Senate, there does not now exist a single one of the several facts upon which this Court in the Kentucky Distilleries case relied in reaching the conclusion that the statute there in question should, upon the facts as they then existed, be upheld. All of these things ceased to be long prior to the time or any of the times to which this suit relates.

5. *Acts and Proclamations of the President.*

We submit that for the purposes of the act here under consideration a presidential proclamation announcing the termination of the war was unnecessary. But if such proclamation had been necessary, it was repeatedly made. The facts in that regard are set forth in the agreed statement of facts as follows (Record, p. 35, *et seq.*):

"On November 11th, 1918 (Official U. S. Bulletin, November 11, 1918, page 5) the President in an address to Congress announcing the terms of the armistice stated among other things:

'The war thus comes to an end; for having accepted these terms of armistice it will be impossible for the German command to renew it. It is not now possible to assess the consequences of this great consummation. We know only that this tragical war whose consuming flames swept from one nation to another until all the world was on fire is at an end and that it was the privilege of our own people to enter it at its most critical juncture in such fashion and in such force as to contribute, in a way of which we are all deeply proud, to the great result. We know, too, that the object of the war is attained; the object upon which all free men had set their hearts; and attained with sweeping completeness which even now we do not realize.'

On November 18, 1918 (Official U. S. Bulletin, November 18, 1918, page 1) the President issued his Thanksgiving proclamation, in which, among other things, it was stated:

'This year we have special and moving

cause to be grateful and to rejoice. God has in His good pleasure given us peace. It has not come as a mere cessation of arms, a mere relief from the strain and tragedy of war. It has come as a great triumph of right. Complete victory has brought us not peace alone, but the confident promise of a new day as well, in which justice shall replace force and intrigue among the nations.'

On December 2, 1918, (Official U. S. Bulletin, pages 1, 5, 6, 7 and 8) the President in his address to Congress referred to "the great processes by which the war was pushed irresistibly forward to the final triumph"; stated that 'the war could not have been won or the gallant men who fought it given an opportunity to win it otherwise' if those at home had not done their duty; that after Chateau-Thierry 'it was only a scant four months before the commanders of the Central Empires knew themselves beaten; and now their very Empires are in liquidation,' that 'while the war lasted we set up many agencies by which to direct the industries of the country;' that 'if the war had continued it would have been necessary to raise' certain amounts by taxation; that 'it was necessary that the administration of the railways should be taken over by the government so long as the war lasted * * * but all these necessities have now been served, and the question is, What is best for the railroads and for the public in the future?' Again:

'And now we are sure of the great triumph for which every sacrifice was made. It has come, come in its completeness, and, with the pride and inspiration of these days of achievement quick within us, we turn to the tasks of peace again * * * a peace

secure against the violence of irresponsible monarchs and ambitious military coteries, and are made ready for a new order, for new foundations of justice and fair dealing. We are about to give order and recognition to this peace not only for ourselves but for the other peoples of the world as well, so far as they will suffer us to serve them.

* * * So far as our domestic affairs are concerned the problem of our return to peace is a problem of economic and industrial readjustment. * * * It is surprising how fast the process of return to a peace footing has moved in the three weeks since the fighting stopped. It promises to outrun any inquiry that may be instituted and any aid that may be offered. It will not be easy to direct it any better than it will direct itself. The American business man is of quick initiative."

"On July 10, 1919, (Congressional Record of that date, page 2472), the President in his address to the Senate when he presented the treaty to it for ratification, among other things, said: 'The war ended in November, eight months ago.'

On October 27, 1919, (Congressional Record of that date, page 8063), the President in his message to Congress accompanying the veto of the Volstead Prohibition Act, among other things, said:

"I object to and can not approve that part of this legislation with reference to war-time prohibition. It has to do with the enforcement of an act which was passed by reason of the emergencies of the war and whose objects have been satisfied in the demobilization of the Army and Navy and whose repeal I have already sought at the

hands of Congress. Where the purposes of particular legislation arising out of war emergency have been satisfied, sound public policy makes clear the reason and necessity for repeal.'

On November 11, 1919, in a public proclamation issued in commemoration of the signing of the armistice one year before, the President, among other things, said:

'A year ago today our enemies laid down their arms in accordance with an armistice which rendered them impotent to renew hostilities and gives to the world an assured opportunity to reconstruct its shattered order and to work out in peace a new and juster set of international relations. * * * Our power was a decisive factor in the victory. * * * Out of this victory there arose new possibilities of political freedom and economic concert. The war showed us the strength of great nations acting together for high purposes and the victory of arms foretells the enduring conquests which can be made in peace when nations act justly and in furtherance of the common interests of men.'

On November 5, 1919, the President in his Thanksgiving proclamation, among other things, said:

'A year ago our people poured out their hearts in praise and thanksgiving that through Divine aid the right was victorious and peace had come to the nations which had so courageously struggled in defense of human liberty and justice. Now that the stern task is ended and the fruits of achievement are ours, we look forward with confidence to the dawn of an era where the sacrifices of the nations will find recompense in a world at peace.'

On December 2, 1919, (Congressional Record of that date, page 28 et seq.), the President in his annual message to Congress, among other things, said:

(Page 30.) 'The Congress might well consider whether the higher rates of income and profits taxes can in peace times be effectively productive of revenue and whether they may not on the contrary be destructive of business activity and productive of waste and inefficiency.

'There is a point to which in peace times high rates of income and profits taxes discourage energy, remove the incentive to new enterprise, encourage extravagant expenditures, and produce industrial stagnation, with consequent unemployment and other attendant evils * * *. Before the war America was heavily the debtor of the rest of the world * * *; the recent war has ended our isolation and thrown upon us a great duty and responsibility * * *. During the war the farmer performed a vital and willing service to the nation. * * *. He indispensably helped to win the war.'

And on March 19, 1920, the President publicly announced as follows (Rec., p. 43):

'I have carefully considered the question whether the war power of the Lever Act should be temporarily invoked by me despite the absence of any action of the commission so recommending to continue temporarily the control of prices and have concluded that it is not expedient for me to exercise any such price-fixing control so that on and after April 1, 1920, no Government maximum prices will be enforced.

There is at present no provision of law for fixing new coal prices for peace time purposes and unless and until some grave emergency shall arise which in my judgment has a relation to the emergency purposes of the Lever Act I would not feel justified in fixing coal prices with reference to future conditions of production. . . . I am sure the public fully appreciates the desirability where practicable of leaving commercial transactions untrammelled, but at the same time I am satisfied the public will find ways to protect itself if such liberal policy shall appear to result in unreasonably high prices.'

6. *Acts and Resolutions of Congress.*

The developments of this period are reflected in the acts and resolutions of Congress.

On January 7, 1919 (40 Stat., p. 1652), an act was passed and approved by the President providing for the transportation from the District of Columbia of civilian governmental employees whose services, by reason of the passing of the war emergency, were no longer required. This act provided that employees whose services were thus dispensed with "during the period from November 11, 1918, to February 20, 1919," should receive actual railroad transportation, including sleeping car accommodations, to the place from which they were employed or to their respective legal residences. It is a matter of public record that under this act great numbers of these employees departed for their homes during the period mentioned.

On March 2, 1919 (40 Stat., p. 1272), Congress passed and the President approved an act relating to the cancellation of war contracts and making ad-

adjustments thereunder with the contractors. It is a matter of public record that such contracts were forthwith cancelled and adjustments thereunder made.

On March 4, 1919, Congress passed and the President approved the statute (49 Stat., p. 1348) already referred to for the protection of the United States against loss under the previous presidential guarantees of wheat prices. As we have already pointed out, those guarantees and this statute related solely to the crops of 1918 and 1919, and the statute, by its terms, was to expire not later than June 1, 1920.

On July 11, 1919, Congress passed and the President approved an act (41 Stat., p. 179) providing for the discharge from the navy of enlisted men who, since February 3, 1917, and before November 11, 1918, had enlisted for the period of four years, the provision being that such enlistment should be held and construed to have been for the duration of the war only. It is a matter of public record that large numbers of resignations and discharges from the navy, marine corps and coast guard have occurred by virtue of this enactment, with the result that the naval forces were long ago reduced to a peace basis.

On July 11, 1919, Congress passed and the President approved an act (41 Stat., p. 157) whereby the joint resolution of July 16, 1918 (40 Stat., p. 504), authorizing the President to possess and operate the telegraph and telephone systems "for the duration of the war" was repealed and the President was authorized and directed to return said properties to their owners on July 31, 1919, which, as we have already shown, was done.

On July 11, 1919, Congress passed and the President approved an act authorizing the President to sell or lease real property acquired "since April 6, 1917, for storage purposes for the use of the army"; authorizing the Secretary of War to turn over to other executive departments the surplus of "ammunition explosives and other munition components"; and authorizing the Secretary of War to place at the disposal of the American Red Cross "such medical and surgical supplies and supplementary and dietary foodstuffs used in the treatment of the sick and injured now in Europe and designed for but which are not now essential to the needs of the American Expeditionary Forces . . . to be used by said American Red Cross as it shall determine, to relieve and supply the pressing needs of the peoples of countries involved in the late war."

On July 11, 1919, Congress passed and the President approved an act (41 Stat., p. 67) authorizing the sale of unused war supplies "no longer required because of the cessation of war activities."

On July 19, 1919 Congress passed and the President approved an act (41 Stat., p. 180) authorizing the sale or other disposal of the ship-building materials and plants which had been acquired for war purposes by the United States Shipping Board Emergency Fleet Corporation.

On July 19, 1919, Congress passed and the President approved an act (41 Stat., p. 193) authorizing the Secretary of War to transfer without charge to the Interior Department "explosives and explosive material for which the War Department has no further use"; and an act (41 Stat., p. 231) authorizing the President to transfer to the custody and care of

such of the departments as he may determine "the files and records of the agencies created for the period of the war upon the discontinuance of such activities," and authorizing the Secretary of War to transfer to any branch of the government service having appropriations available "any unused and surplus motor propelled vehicles and motor equipment of any kind."

On July 25, 1919 (41 Stat., p. 272), Congress passed and the President approved a joint resolution providing for the loan of tents "to recognized organizations of veterans of the late world war."

On September 3, 1919, Congress passed and the President approved an act (41 Stat., p. 283), reviving the office of General of the Armies of the United States and providing for the appointment to said office of "a general officer of the army who, on foreign soil *during the recent war*, has been especially distinguished," etc.

On October 28, 1919, Congress passed over the veto of the President the Volstead Act (41 Stat., p. 205). But as has already been pointed out, it was then apparent to Congress that this act as a war measure and as an amendment to the War Time Prohibition Act could only be effective until the succeeding January 15, 1920, because at that date the entire field would be occupied by the Eighteenth Amendment, not a war measure.

On November 19, 1919, Congress passed and the President approved an act (41 Stat., p. 269) authorizing the Secretary of War to sell at fifteen per centum of their cost, machine tools owned by the United States and under control of the War Department.

On November 19, 1919, Congress passed and the President approved a joint resolution (41 Stat., p. 361) extending until January 15, 1920, the provisions of the Trading with the Enemy Act, and of any proclamation issued thereunder, which prohibited or controlled importation into the United States of dyes or other coal tar products. On July 14, 1919 (Congressional Record, Vol. 59, p. 7670), the War Trade Board section of the Department of State, under said Trading with the Enemy Act, had issued a general enemy trade license authorizing all persons in the United States, on and after said date, to trade and communicate with persons residing in Germany and to trade and communicate with all persons with whom trade and communication is prohibited by said act, except that said license did not authorize

(1) Importation of dyes, dyestuffs, potash, drugs or chemicals manufactured in Germany;

(2) Any change in present restrictions against trade and communication with Hungary or that portion of Russia under Bolshevik control;

(3) Trade with respect to any property theretofore reported to or which should have been reported to the Alien Property Custodian, or which had been seized by him.

On December 31, 1919, Congress passed and the President approved an act (41 Stat., p. —, F. S. A. 1919, Supplement 61) authorizing the President to continue for certain purposes the United States Sugar Equalization Board. This act has already been referred to and analyzed. It expired as to the domestic product on June 30, 1920, and was to wholly expire in every respect on December 31, 1920.

By its terms it was to be availed of by the Executive only "if found necessary for the public good," and as we have already shown, nothing whatsoever was done thereunder.

On February 14, 1920, Congress passed and the President approved an act (41 Stat., p. —, 262 Fed., Pamphlet 5, Supplement, p. 234) granting certain preference rights to homesteads on the public lands to "officers, soldiers, sailors or marines who have served in the army or navy of the United States in the war with Germany."

On February 28, 1920, Congress passed and the President approved the Transportation Act of 1920 (41 Stat., p. —, 262 Fed., Pamphlet 2, Supplement, p. 332), wherein it was provided (Title II, Section 200) that federal control of railroads "shall terminate at 12.01 a. m., March 1, 1920; and the President shall then relinquish possession and control of all railroads and systems of transportation then under federal control and cease the use and operation thereof. Thereafter the President shall not have or exercise any of the powers conferred upon him by the Federal Control Act relating," etc.

On March 6, 1920, Congress passed and the President approved an act (41 Stat., p. —, 264 Fed., Pamphlet 5, Supplement, p. 417) authorizing the Secretary of War to transfer to the Federal Board for Vocational Education, without compensation therefor, surplus machine tools and other equipment belonging to the War Department.

On March 15, 1920, Congress passed and the President approved an act (41 Stat., p. —, 264 Fed., Pamphlet 5, Supplement, pp. 462, 463), authorizing and directing the Secretary of War to transfer

motor propelled vehicles and motor equipment pertaining to the military establishment and no longer required for military purposes to the Department of Agriculture, the Postoffice Department, and the Treasury Department; also authorizing and directing the Secretary of War to transfer to the Department of Agriculture, for use in the improvement of highways and roads, war material, equipment and supplies not required for military purposes; and authorizing and directing the Secretary of War to transfer to the Department of Agriculture, for the use of the Forest Service, telephone supplies pertaining to the military establishment no longer required for military purposes.

On April 17, 1920, Congress passed and the President approved a Joint Resolution (41 Stat., p. —, 264 Fed., Pamphlet 5, Supplement, p. 462) authorizing and directing the Secretary of War to sell all dental outfits in excess of the needs of the government, preferentially to persons who served *"during the recent war."*

On April 23, 1920, Congress passed and the President approved a Joint Resolution (41 Stat., p. —, 264 Fed., Pamphlet 5, Supplement, p. 465) authorizing the Secretary of War to sell nitrate of soda "now held as a reserve supply of the War Department."

On April 24, 1920, Congress passed and the President approved an act (41 Stat., p. —, 264 Fed., Pamphlet 5, Supplement, p. 465), authorizing the Secretary of War to loan to any state of the Union, for use in highway construction, such tractors as are retained and not distributed under the act of March 15, 1920, above referred to; and also author-

izing the Secretary of War to deliver and turn over to the Postmaster General, without charge therefor, such motor vehicles, airplanes and parts, and machinery and tools to repair and maintain the same, as may be suitable for use in the postal service.

On March 31, 1920, there was introduced in the House of Representatives a joint resolution declaring the existence of peace, repealing the resolution of April 6, 1917, declaring war against the Imperial German Government, and likewise declaring the termination of all war time legislation (Congressional Record, Vol. 59, pp. 5469, 5765). On April 9, 1920, it passed the House (Congressional Record, Vol. 59, p. 5875). It was somewhat amended in the Senate, but not in a way to affect the provisions above mentioned (Congressional Record, Vol. 59, p. 7029). As so amended it passed the Senate on May 15, 1920 (Congressional Record, Vol. 59, p. 7681). On May 21, 1920 (Congressional Record, Vol. 59, p. 8025) the House concurred in the Senate amendments, and so the joint resolution was finally passed. On May 27, 1920 (Congressional Record, Vol. 59, p. 8392), it was vetoed by the President, and on the following day (Congressional Record, Vol. 59, p. 8469) it failed of passage in the House notwithstanding the veto, the majority in its favor, though large, not being sufficient to constitute the necessary two-thirds. The importance of this resolution and of the action taken thereon is such that it is hereinafter separately discussed.

7. *The Joint Resolution of Congress (House Joint Resolution 327) introduced March 31 and passed May 21, 1920, Declaring the Existence of Peace.*

At the end of the last portion hereof mention was made of the joint resolution introduced on March 31, 1920, and passed by both houses of Congress on May 21, 1920, whereby the existence of peace was formally declared, and the resolution of April 6, 1917, declaring war against the Imperial German Government was repealed, and whereby also the termination of all war time legislation was formally and expressly declared.

As originally framed and as it passed the House, the resolution (designated as House Joint Resolution 327, Congressional Record, Vol. 59, p. 5765) provided in Section 1 "that the state of war declared to exist between the Imperial German Government and the United States by the Joint Resolution of Congress approved April 6, 1917, is hereby declared at an end", and by Section 2 thereof express and formal provision was made for the immediate termination of all war time legislation.

In the Senate, Section 1 of the resolution, insofar as here relevant, was amended so as to read as follows (Congressional Record, Vol. 59, p. 7029): "That the Joint Resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and the Government and people of the United States, and making provisions to prosecute the same, be and the same is hereby repealed, and the state of war is hereby declared at an end"; Section 2 was not amended but remained as it had passed the House.

In this form the joint resolution passed both Houses of Congress by very large majorities (Congressional Record, Vol. 59, pp. 5875, 7681 and 8025). The debate in both houses of Congress is exceedingly interesting. (In the House, Congressional Record, Vol. 59, pp. 5755 to 5749, 5822 to 5876; in the Senate, Congressional Record, Vol. 59, pp. 7021 to 7030, 7088 to 7098, 7472 to 7476, 7535 to 7540, 7543 to 7547, 7664 to 7681.) Special attention is directed to the committee reports (Congressional Record, Vol. 59, pp. 7021, 7022, 7028 to 7030), and to the address of Senator Knox (Congressional Record, Vol. 59, pp. 7088 to 7098).

The passage of this joint resolution by large majorities in both houses of Congress is exceedingly significant. We have already referred to and quoted the repeated declarations of the President that the war had ended long before. We have likewise referred to the previous course of legislation in Congress, indicating its conviction that such was the case and that the necessity for the further continuance of war time legislation had passed. But said joint resolution introduced on March 31 and passed on May 21, 1920, removes all possible doubt as to the conviction of Congress upon these subjects. With the President and Congress both declaring that the war has ended, and with an act of Congress before us which by its express provision is to terminate with the ending of the war, how is it possible to conclude or even to contend that said statute is longer effective?

The joint resolution just referred to was on May 27, 1920 (Congressional Record, Vol. 59, p. 8392), vetoed by the President. An interesting question

here arises as to whether congressional action of this character is subject to the veto power. If it is not, then the attempted veto was wholly ineffective for any purpose. But in any event, it was wholly ineffective to destroy or to lessen the probative force in this case of the action of Congress to which we have referred.

But when we examine the presidential message which accompanied the veto (Congressional Record, Vol. 59, p. 8392), we find that the reasons assigned therein have no reference whatsoever to the continuance of a state of war or to the necessity or desirability of keeping in force in this country the war time legislation; no suggestion is made that the war still continues or that a situation still exists calling the war powers of Congress into play or justifying or permitting the continued enforcement of acts passed in the exercise of those powers. On the contrary, the sole objection made to the resolution is that it had been enacted without the ratification of the treaty of Versailles, special emphasis being laid upon those provisions of said treaty constituting the covenant of the League of Nations. Thus it appears, even from this veto message, that the President does not disagree with Congress that the war has actually ended and that the necessity and propriety of war time legislation no longer exists, but only that the President is insistent, as he has always been, that the treaty of Versailles shall be ratified.

8. *No treaty was necessary to terminate the war with Germany. It ended with the signing of the armistice, which was in effect a complete capitulation, and with the total destruction of the Imperial German Government against which, alone, we had been at war.*

The foregoing array of undisputed and indisputable facts demonstrates, we submit, that long prior to the time or to any of the times to which this suit relates, the war with Germany had actually terminated, all war time activities of this Government had ceased, and that nothing remained undone except the ratification by the Senate of the treaty of Versailles. But the statute with which we are dealing says nothing about a treaty. According to its own provisions, it terminates with the ending of the war. But war may and frequently does terminate without a treaty. History is full of such instances. And certainly it cannot be that, under our federal constitution, a war, though actually ended, theoretically continues until a treaty is signed and ratified.

By the Constitution (Article II, Section 2, clause 2), the treaty making power is vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the senators present concur. But at the conclusion of a war a president might, if evil-minded, or for any ulterior purpose, or even because he could not come to an agreement with the other party to the contract, fail to make a treaty or fail to submit such a treaty to the Senate. Could it possibly be contended that because of such failure the war continued? If so, war powers might still be exerted and the states and the citizens of this

Union subjected for an indefinite period to the invasion of their rights, which, while war was flagrant, had been deemed necessary and had been cheerfully borne.

Or to recur to the facts which now exist, can it be possible that merely because the Senate refuses to concur with the President as to what kind of a treaty ought to be made, this disagreement indefinitely prolongs a war actually long since ended and continues in the national government the arbitrary powers which actual warfare alone can justify?

That a disagreement in respect to the form of said treaty exists between the President and the Senate is, of course, apparent. But that, we submit, is not war in the sense of the constitution, nor does it justify or permit the continuance of the war powers.

To what does that disagreement relate? It is a matter of public history, disclosed by public records of which this court will take judicial notice, that the provisions of the treaty to which the Senate objects are not at all those relating to the terms to be imposed upon the defeated enemy, but solely those relating to the League of Nations, which is a proposed compact between this country and all the nations of the world, other than the defeated enemy nations, whereby the future conduct of world affairs shall in certain particulars be regulated. It seems inconceivable that a contention could be made that such a situation, under the facts hereinabove recited, prolongs the state of war and keeps in full force and effect the war time powers.

The treaty of Versailles may never be ratified. It has already been twice rejected by the Senate.

Apparently, that action is final. No steps are being taken to negotiate a new treaty. It seems as certain as anything human ever can be that this particular treaty will never receive the approval of the Senate. Certainly it cannot be that this is war in the sense of the Constitution or that it keeps alive the war powers of any branch of the federal government. If it does, how long will it suffice for that purpose, and where will the end be?

A treaty is a compact between nations, contractual in its nature. A treaty may be and often is made having no relation whatsoever to war and between nations wholly at peace. The provisions of the treaty of Versailles which were the cause of its rejection by the Senate are peculiarly of this nature. They relate to a compact between the nations for the future conduct of world affairs.

In Oppenheim on International Law, Vol. 2, p. 322, it is said:

"War may terminate in three different ways: Belligerents may: (1) Abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty; (2) Belligerents may formally establish the condition of peace through a special treaty of peace; (3) A belligerent may end the war through subjugation of its adversary."

In Phillipson on Termination of War and Treaties of Peace, page 3, it is said: "There are three ways of terminating hostilities between states, namely, (1) By a mere cessation of hostilities on both sides without any definite understanding supervening; (2) By the conquest and subjugation of one of the contending parties by the other, so that

the former is reduced to impotence and submission; (3) By a mutual arrangement embodied in a treaty of peace, whether the honors of war be equal or unequal."

On July 22, 1868, Mr. Seward, then Secretary of State, in diplomatic correspondence with Spain relative to the war between Spain and the allied South American States, which had ended without a treaty, said (*Diplomatic Correspondence 1868*, Vol. 2, pp. 32 to 34, cited *Moore's International Law*, vol. 7, p. 336):

"It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences."

The armistice signed on November 11, 1918, evidenced the complete submission of a defeated Germany. It was in fact a capitulation. Referring to this armistice, the President of the United States, who, under the constitution is the commander-in-chief of its army and navy, said on November 11, 1918 (*Rec.*, p. 37): "The war thus comes to an end; for having accepted these terms of armistice it will be impossible for the German command to renew it"; on December 2, 1918 (*Rec.*, p. 41): "Since the armistice was assured (which is in effect a complete submission of the enemy)"; and on July 10, 1919 (*Rec.*, p. 37): "A year ago today our enemies laid down their arms in accordance with an armistice which rendered them impotent to renew hostilities."

Marshal Foch, commander-in-chief of all of the allied forces, replying to an inquiry as to whether

the armistice had not been accorded to the German Government too soon, said (Congressional Record, vol. 59, p. 7091): "It was difficult to ask more. Doubtless any general would have preferred to have continued the struggle and give battle when battle offered itself so promisingly. But the father of a family could not fail to think of the blood that would be shed. A victory, however easy, costs the lives of men. We held victory in our grasp without any further sacrifice. We took it as it came. The German high command was not ignorant of the fact that it faced colossal disaster. When it surrendered everything was prepared for an offensive in which it would infallibly have succumbed. On November 14th we were to attack in Lorraine with twenty French divisions and six American divisions. This attack would have been supported by other movements in Flanders and in the center. The Germans were lost. They capitulated. There is the whole story."

These statements by the military commanders, not only of our own forces but of all of the Allied forces, should be conclusive. But a consideration of the terms of the armistice (Senate Document 117, Sixty-sixth Congress, First Session), to which it is agreed reference may be made (Record, p. 35), is convincing proof, if any more were needed, that there had been a complete surrender. In the address of Senator Knox delivered in the Senate of the United States on May 5, 1920 (Congressional Record, vol. 59, p. 7090), the terms of the armistice in this regard are carefully analyzed and accurately set forth. These terms, which deprived Germany of its army, its navy, its munitions of war, and everything else

with which war could be carried on, rendered it certain beyond peradventure of doubt that the war was then and there upon the signing of said armistice ended by the complete subjugation and capitulation of the enemy.

But beyond this, the war which we had on April 6, 1917, declared, was not against Germany or the German people, but against "the Imperial German Government," and this declaration was made following the address by the President, in which he stated that we had no quarrel with the German people but only with the Imperial Government (Congressional Record, vol. 59, pp. 7089, 7090). It is a matter of public history that prior to the signing of the armistice the Imperial German Government was overthrown and destroyed, that the Kaiser and his family had fled, and that since then the government of Germany has been democratic in form. Since our antagonist against which we declared war, has been destroyed and no longer exists, how is it possible for us to remain at war with it?

These considerations emphasize the conclusion, otherwise inevitable, that the ratification of the treaty of Versailles, or any other treaty, is wholly unnecessary to the termination of the war with Germany. It terminated long ago, and even though a treaty relating to such termination be never ratified (which is not at all impossible or even improbable), it cannot be revived.

3. *Effect of the Treaty of Versailles.*

On June 28, 1919, the treaty of peace with Germany was signed at Versailles by the treaty plenipotentiaries of Germany and of the Allied powers,

including the United States. Said treaty is set forth at length in the Congressional Record of July 10, 1919, pages 2475, et seq., and it is agreed that the same may be referred to by either party (Record, p. 37).

By that treaty it was provided in the last paragraph of the preamble: "From the coming into force of the present treaty the state of war will terminate. From that moment and subject to the provisions of this treaty, official relations with Germany, and with any of the German states, will be resumed by the Allied and Associated powers."

By the concluding paragraph of the treaty it was provided that the treaty should be ratified and that: "The deposit of ratifications shall be made at Paris as soon as possible * * * The first *procès verbal* of the deposit of ratifications will be drawn up as soon as the treaty has been ratified by Germany on the one hand, and by three of the principal Allied and Associated powers on the other hand. From the date of this first *procès verbal* the treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present treaty, this date will be the date of the coming into force of the treaty. In all other respects the treaty will enter into force for each power at the date of the deposit of its ratification."

Said treaty was ratified on July 10, 1919, by Germany; on July 25 and July 31, 1919, by the British parliament and King George, respectively; on October 7, 1919, by Italy; on October 13, 1919, by France; and on October 27, 1919, by Japan. It has

since been ratified by all of the other Allied and Associated powers therein mentioned, except that the Senate of the United States has not yet concurred therein (Record, page 37).

The first *process verbal* was, in accordance with the provision of the treaty quoted above, drawn up and deposited in January, 1920 (Congressional Record, Vol. 59, p. 7092).

What is the result of these facts? The treaty embodied in large measure the terms of the armistice agreement and made them the permanent terms of Germany's surrender.

By virtue of the provisions of the treaty quoted above and what has since occurred, the treaty is now undoubtedly in force as to Germany and as to all of the Allied and Associated powers except, as is contended, the United States. But while the Senate of the United States has not as yet concurred with the action of the President in making said treaty, so that perhaps this nation is not bound by the obligatory portions thereof, it is, we submit, clear that the treaty is so far in force that by virtue of its terms the state of war has terminated even as to the United States.

In any event, it is clear that under the terms of said treaty the United States is not at war, even though it be not at peace, with Germany. Certainly the treaty is in force as to Germany and therefore Germany is, by its terms, at peace not only with all of the other Allied and Associated powers, but also with the United States. The terms of said treaty render it impossible for Germany to resume war with the United States, even if it were so disposed. And this is and will continue to be true even though

the Senate of the United States never ratifies the treaty.

If, therefore, appellant's contention be upheld, we are at war with Germany although Germany is at peace with us and with all the other of her late antagonists.

The amazing and anomalous situation in which this country is placed, if appellant's contention be correct, is well illustrated by considering the facts respecting the occupation of the Rhine bridgeheads, which began under the terms of the armistice agreement and is continued under the terms of the treaty. These facts are set forth in the agreed statement of facts herein (Record, page 39). It appears that the United States has, and since the armistice was signed has had, at the bridgehead of Coblenz about seventeen thousand men. The British troops are and have been at the bridgehead of Cologne, and the French troops at the bridgehead of Mayence. As to France and the British Empire, as well as Germany, the treaty has undoubtedly been in force since January, 1920. Under the terms of the treaty the Cologne bridgehead is to be evacuated in five years, the Coblenz bridgehead in ten years and the Mayence bridgehead in fifteen years, if all of the conditions of the treaty are faithfully performed by Germany. Our troops are at the bridgehead of Coblenz for exactly the same purpose and are there doing exactly the same things as the British troops at the bridgehead of Cologne or the French troops at the bridgehead of Mayence. Can it be possible that the American troops while so engaged are waging war, while those of France and Great Britain, though engaged

in exactly the same activities for precisely the same purpose, are not? If so, how long will such warfare continue? The bridgehead of Coblenz is to be occupied for at least ten years. Will our war with Germany continue throughout this period, and if not, when will it end? Surely a contention leading to such absurd results cannot be upheld. We submit with respectful confidence that even in the absence of all other evidence, the negotiation and signing of the treaty of Versailles, its terms, and the transactions which have occurred thereunder, render it certain that the war with Germany terminated long prior to the time or any of the times to which this suit relates.

10. *Appellant's Contentions and Authorities. Conclusion.*

Appellant's contention is and must be based upon the assertion that the war with Germany continues. The conclusion that this is so must be derived solely from the fact that the Senate of the United States has not yet concurred in the treaty of Versailles and that therefore the President has not issued a proclamation of its ratification. The futility of these contentions has, we submit, been demonstrated.

The authorities cited by appellant in support of his contention are these:

United States v. Anderson, 9 Wallace 56;

The Protector, 9 Wallace 687, 12 Wallace 700;

Hijo v. United States, 194 U. S. 315.

United States v. Anderson, *supra*, and *The Protector*, *supra*, related to our Civil War. The distinction between a civil war such as that by which this country was rent from 1861 to 1865, and a war with a foreign state or nation is clear and in the decisions cited was expressly recognized. In the eye of the law and in the light of its result, the Civil War was a rebellion or insurrection. It did not terminate when the organized forces of the Confederacy surrendered. It did not terminate by the complete submission or capitulation of any organized government, for at the date of the surrender of the organized military forces of the Confederacy the Confederate Government had ceased to exist, its officers had fled, and none had taken its place. And, of course, the existence of the Confederate Government, as such, had never been recognized by that of the United States. Even after the surrender of the organized military forces of the Confederacy the insurrection continued. Armed bands, still unsubdued, operated in many quarters and other like disorders prevailed. Viewing the Civil War as one which, on the part of the Confederate States, constituted rebellion or insurrection, it does not admit of doubt that these were not suppressed until the last of the disorders mentioned above had been finally quelled. And this occurred at different times in different sections of the late Confederacy. That the rules by which is to be determined the date of the ending of an insurrection or rebellion against the established government are wholly different from those by which is to be determined the date of the ending of a foreign war, is, we submit, perfectly clear.

United States v. Anderson, *supra*, referred to a provision of the Act of March 12, 1863 (12 Stat. 820), known as the Abandoned or Captured Property Act, that "any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims." The contention was made that the particular claim there involved was barred by this statute because not preferred within two years after the suppression of the rebellion. The question was as to the construction of this act and as to when, in the sense of the said statute, the suppression of the rebellion occurred. The case did not, as this one does, involve any constitutional question or any claim that the war powers of Congress continued because of a continuance of the emergency which alone could call them into play. It related solely to the construction of an act of Congress passed pursuant to its ordinary powers, and concerning a statute of limitations. As was said by the court (9 Wallace 69), "the point, therefore, for determination is, when, in the sense of this law, was the rebellion entirely suppressed. And in this connection it is proper to say that the purposes of this suit do not require us to discuss the question—which may have an important bearing on other cases—whether the rebellion can be considered as suppressed for one purpose and not for another, nor any of the kindred questions arising out of it, and we therefore express no opinion on the subject." In the Anderson case the court availed itself of the only evidence at hand concerning the date of the complete

and final suppression of the rebellion and construed the act of Congress accordingly.

The Protector (9 Wallace 687) involved the provisions of the 22nd section of the Judiciary Act of 1789 and the Act of March 1, 1803, supplementary thereof, as affected by an act of March 2, 1867 (14 Stat. 545), all relating to the time within which an appeal or writ of error may be brought to the Supreme Court from an inferior federal court. This case, therefore, like the one last above referred to, related to acts of Congress passed pursuant to its ordinary legislative powers and not in the exercise of its war powers, and the question was merely as to the proper construction of those statutes.

The Protector (12 Wallace 700) was the same case considered again upon another motion to dismiss the appeal. It involved the same acts of Congress. In *Hanger v. Abbott* (6 Wallace 532), the court had held that all statutes of limitation contained an implied exception so that they did not run during the rebellion against citizens of states adhering to the national government having demands against citizens of the insurgent states. The question, therefore, was when, in the sense of this implied exception to the statute requiring appeals to be brought within a certain time, the rebellion was finally suppressed. The court said:

"The question in the present case is, When did the rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the statute of limitations by the War of the Rebellion?

"Acts of hostility by the insurgents occurred at periods so various and of such dif-

ferent degrees of importance and in parts of the country so remote from each other, both at the commencement and the close of the late Civil War, that it would be difficult if not impossible to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be and in fact was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken * * *. In the absence of more certain criteria of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the states mentioned in them."

These words make clear the distinction already mentioned between the termination of a domestic rebellion or insurrection and that of a foreign war. They also make clear the fact that the court availed itself of the only evidence at hand, and that if it had been supplied with such evidence as that now presented in the case at bar, it would no doubt have been guided thereby.

Hijo v. United States (194 U. S. 315) involved the construction of the Act of March 3, 1887, known as the Tucker Act (24 Stat. 505), as supplemented by the Act of April 12, 1900 (31 Stat. 85), concerning the jurisdiction of the United States District Court for Porto Rico. The question was whether the claim involved in the suit was founded on contract, express or implied, for if it was not, then the suit was not within the jurisdiction of the lower court.

The suit was to recover the value of the use of a vessel belonging to Spanish subjects and taken by our army and navy during the war with Spain. The court said (page 323) :

"The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action in its essence is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is, in form, for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. 'A truce or suspension of arms,' says Kent, 'does not terminate the war, but it is one of the *commencia belli* which suspends its operations * * *. At the expiration of the truce hostilities may re-commence without any fresh declaration of war.' (1 Kent 159, 161). If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel pending negotiations for a treaty of peace."

But this case, like the others reviewed above, related to the proper construction of an act of Congress passed pursuant to its ordinary powers, and not to an act finding its basis solely in the war powers, nor to such invasions of the constitutional rights of the states and their citizens as are here in-

involved. Moreover, the facts presented were altogether different. No one could contend that at the termination of hostilities in the Spanish war Spain had surrendered or capitulated, as Germany certainly did at the close of the world war. The protocol with Spain of August 12, 1898, was a wholly different thing from the armistice agreement with Germany of November 11, 1918. That protocol was in fact merely "a truce or suspension of arms" and not a surrender or capitulation, as we have demonstrated the armistice agreement with Germany to have been. At the expiration of the truce declared by said protocol it would have been possible for hostilities to recommence if the treaty had not intervened. But the armistice agreement with Germany never expired. It became embodied in the treaty of Versailles, and from the moment that the armistice was signed it became, still is and will remain wholly impossible for Germany to resume hostilities. Moreover, in the case of the Spanish war a period of only seven months intervened between the date of the protocol and the ratification of the treaty of peace. But in the case at bar nearly two years have now elapsed since the signing of the armistice agreement, the Senate of the United States has not yet ratified the treaty of Versailles, and so far as human foresight can foretell, it never will.

These considerations render the authorities relied upon by appellant wholly inapplicable to the case at bar and deprive them of any force as precedents herein.

Stewart v. Kahn (11 Wallace 493) is another case upon which appellant in the court below relied. It related to an act of Congress of July 11,

1864, which provided, in substance, that if "during the existence of the present rebellion" a cause of action should accrue or be snable upon against one who, by reason of resistance to the execution of the laws of the United States or the interruption of the ordinary course of judicial proceedings, cannot be served with process, the time during which such person shall be beyond the reach of judicial process shall be excepted from the period prescribed by any statute of limitations. This statute declared in the form of a written law substantially what the court had previously, in *Hanger v. Abbott* (6 Wallace 532), held to be a part of the unwritten law. The statute was enacted at a time when the war of the rebellion was flagrant and the subject with which it dealt was the closing of the courts or the suspension of judicial process occasioned by such war. The claim involved was based upon a promissory note which fell due in 1861. The suit thereon was brought April 16, 1866. A statute of limitations prescribing a period of five years was pleaded as a defense, because "one month and three days after the period of limitation had elapsed" expired before the suit was brought. But the court held that under the act of Congress, as well as under the general rule enunciated in *Hanger v. Abbott*, *supra*, at least enough time must be added to the period of limitation to permit the maintenance of the action. The act of Congress was attacked as being unwarranted by the Constitution and therefore void. But, as we have already pointed out, it was passed while the war was flagrant, related to lapses of time wholly occurring during the period of war, and concerned causes of action which accrued while

the war continued but could not be enforced because of the existing state of war. It was in relation to such a case that the court employed the language here relied upon by appellant:

"The measures to be taken in carrying on war and to suppress insurrection are not defined * * *. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category."

In *Hamilton v. Kentucky Distilleries Co.* (251 U. S. 146, at 161), the words just quoted from the opinion in *Stewart v. Kahn*, *supra*, were referred to to sustain the act there in question as a proper exercise of the war powers of Congress. But, as we have already pointed out, the act considered in the *Kentucky Distilleries* case was passed in aid of demobilization, was enacted before demobilization had commenced, and by its express provisions was to terminate when demobilization ended. The propriety of the application of the principle enunciated in *Stewart v. Kahn* to the facts presented in that case and to those presented in the *Kentucky Distilleries* case is clearly perceptible. But it by no means follows that it will suffice to support as a proper exercise of the war powers such legislation as that with which we are now concerned.

The act here in question, as plainly appears from the President's message of August 8, 1918, pursuant

to which it was passed, was enacted for the sole purpose of attempting to reduce the high cost of living in this country. The evil to which it was directed was not one which had arisen from the rise and progress of our war with Germany. Even before August, 1914, when the late war began, the increase in the cost of living had been marked and was the subject of much complaint. Prior to April 6, 1917, the date on which we entered the war, living costs had enormously increased and were the subject of great concern. It does not admit of doubt that if this nation had not entered the war at all the increase in living costs would nevertheless have occurred. It does not admit of doubt that our participation in the war from April 6, 1917, to November 11, 1918, was not the cause of this increase, but that it was brought about by world-wide economic causes not connected in any way with our participation in the war. If we had never entered the war at all, could anyone successfully contend that Congress, in the exercise of its war powers, could legislate in the manner that it did concerning this subject?

Whether the present high level of costs will ever subside, and if so, when, is a question about which economists do not agree. Certain it is, however, that this condition, not having been caused by our participation in the war, did not cease with its termination and will not cease at any time in the reasonably near future, so far as human foresight can perceive. Can it be successfully contended that the power of Congress to legislate upon such a subject in the manner here attempted will continue until such time as living costs have receded to the level which formerly at one time prevailed? If so, to what level must liv-

ing costs return before the war powers of Congress in this regard shall cease? Is it the level which prevailed just prior to April 6, 1917, when we entered the or is it the one which prevailed just prior to the date in August, 1914, when the war began, or is it the level which prevailed some years prior to that date when, in response to the working of the economic forces to which we have referred, prices began to increase? We submit without fear of successful contradiction that such legislation as that with which we are now dealing cannot be sustained as a proper exercise of the war powers because it is designed "to remedy the evils which have arisen from its rise and progress."

Appellant's argument does and must depend upon these hypotheses:

We are at war with Germany, although Germany is at peace with us and long ago made a formal treaty of peace with all our late allies and associates; we are at war with Germany, although not a shot has been fired nor a hostile action taken since November 11, 1918; we are at war with Germany, although on the date last mentioned Germany capitulated and made complete surrender in such a way that the resumption of hostilities on her part became and remains impossible; we are at war with Germany, although we never declared war against the Germany which now exists and has since November 11, 1918, existed, but only against the Imperial German Government which was then completely destroyed and thereafter was not; we are at war with Germany, although by force of circumstances and by solemn compact entered into between herself and all the other nations of the world, Ger-

many is not waging and cannot wage war with us; we are at war with Germany, although by the armistice agreement of November 11, 1918, Germany was required to and did disband its armies, surrender its navies, destroy its fortifications, surrender or destroy its arms, munitions and material of war, so that it became and is totally without anything with which to wage war; we are at war with Germany, although we have recalled and demobilized all of our armed forces raised for that conflict and reduced the army and the navy to a peace basis, have distributed and applied to the pursuits of peace the stores of supplies, munitions, equipment and other materials assembled for the purpose of the war, have terminated all war-time activities and disorganized all of the forces which were put in operation for war purposes, although we now have nothing left with which to wage war if war there should be; we are at war with Germany, although our President and our Congress have both repeatedly and by formal, deliberate official action declared that the war is at an end; we are at war with Germany because, and solely because, the Senate of the United States has not as yet seen fit to approve a contract, in the form of a treaty, made by the President of the United States with all the other nations of the world and relating, not to the termination of the war with Germany, but to the future conduct of world affairs.

The situation thus presented would be ludicrous if it were not tragical. It belongs in the realm of topsy-turvydom. It is one to delight the mind and inspire the genius of a Lewis Carroll. But surely the substantial rights of citizens guaranteed by the Constitution of the United States are not to be longer

jeopardized upon such a travesty as this. Surely the powers reserved exclusively to the states are not to be longer usurped upon such a pretense.

In conclusion, we beg leave to quote the words with which, in *Jacob Ruppert v. Caffey* (251 U. S. 264), the dissenting opinion closes :

"Moreover, well settled rights of the individual in harmless property and powers carefully reserved to the states, ought not to be abridged or destroyed by mere argumentation based upon supposed analogies. The Constitution should be interpreted in view of the spirit which pervades it and always with a steadfast purpose to give complete effect to every part according to the true intendment—none should suffer emasculation by any strained or unnatural construction. And these solemn words we may neither forget nor ignore :

'Nor shall any person * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' "

II.

THE POWER WHICH CONGRESS IN THE ENACTMENT OF THE STATUTE HERE IN QUESTION ATTEMPTED TO EXERT IS NOT A WAR POWER SPECIFICALLY GRANTED, NOR IS THE STATUTE A LAW NECESSARY AND PROPER FOR CARRYING INTO EXECUTION ANY SUCH POWER.

It will not be contended that the power which Congress, in the enactment of the statute here involved, attempted to exert is granted by any of the provisions of the national Constitution expressly conferring the war powers (Constitution, Article I, Section 8, Clauses 11, 12, 13 and 14). It must be justified, if at all, under that portion of clause 18 of Section 8 of Article I which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," and in applying the constitutional provision last quoted due weight must be given to the principle enunciated in Article X of the Amendments, that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Where it is contended, as here it must be, that an act of Congress is justified because it is a law necessary and proper for carrying into execution any of the powers expressly granted, the rules which govern the decision of the question thus presented are well settled and have many times been stated and applied.

In *McCulloch v. Maryland* (4 Wheat. 316, 421)
Chief Justice Marshall said:

"The sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

The words "necessary and proper," as used in the clause here under consideration, were intended to have a sense at once admonitory and directory, and require that the means used in the execution of an express power shall be bona fide appropriate to the end.

Hepburn v. Griswold, 8 Wallace 603, 614;
Broderick v. Magraw, 8 Wallace 639;
In re Rapier, 143 U. S. 110, 133.

No power can be derived by implication from any express power as means for carrying it into execution unless such laws come within this description.

Hepburn v. Griswold, *supra*.
Broderick v. Magraw, *supra*.
Kansas v. Colorado, 206 U. S. 46, 47.

There must be some relation between the means and end; some adaptedness or appropriateness of the

laws to carry into execution the powers granted by the Constitution.

Legal Tender Cases, 12 Wallace 457, 543.
In re Rapier, *supra*.

And the power to decide whether the means adopted by Congress for the purpose of carrying into effect the powers expressly given are necessary or appropriate to the end, or whether they have any relation to the powers granted by the Constitution, must finally rest with the judiciary and not with Congress.

Hepburn v. Griswold, *supra*.

Broderick v. Magraw, *supra*.

Thompson v. Pacific Railroad, 9 Wallace 579, 588.

Cherokee Nation v. Southern Kansas Railroad, 135 U. S. 641, 657.

And so it has been said that Article X of the Amendments was intended to have a like admonitory and directory sense and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated.

Hepburn v. Griswold, *supra*;

Broderick v. Magraw, *supra*.

These principles have been many times applied and acts of Congress held invalid because in conflict therewith. Numerous illustrations could, of course, be given, but it would serve no useful purpose (4 Enc. Sup. Ct. Reports, pp. 260 et seq.).

Employers Liability Cases (207 U. S. 463), is a recent example of the application of these principles,

in which it was held that the first Employers Liability Act was beyond the power of Congress and so invalid because it did not constitute an appropriate means for carrying into effect the specific power of Congress "to regulate commerce."

Second Employers Liability Cases (223 U. S. 1) again illustrates the application of these principles. There it was held that the second Employers Liability Act was valid because it was such an appropriate means, but the court said (page 48):

"In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."

It is our earnest contention that, viewing conditions as they existed on October 22, 1919, when the statute here involved was enacted, it is impossible to perceive any real or even apparent connection between the carrying into execution of any of the war powers of Congress and the subject with which that statute dealt. What war activity existed on October 22, 1919, which would be efficiently or at all aided by regulating the price at which wearing apparel might be sold at retail?

But in considering this question, as in considering whether or not the war powers existed at all, we are not confined to the date at which the statute in question was enacted. We are at liberty to consider and to have the benefit of changes in the situation which may have occurred subsequent to that date. In view of the fact already demonstrated, that long prior to the filing of the bill in the present case all war activity had ceased and that nothing remained undone except concurrence by the Senate in the treaty of Versailles, how is it possible to conclude that the statute here in question remained or now is a means appropriate to any end which Congress under its war powers did or could have properly in view?

As was said by District Judge Rudkin in *United States v. Spokane Dry Goods Co.* (264 Fed. 209, at 218):

"It may be that Congress has transcended its constitutional powers, it may be that there is no connection between the selling price of some small article of female attire and the prosecution of a war which has passed into history and is little more than a memory."

Jacob Ruppert v. Caffey (251 U. S. 264) is, we submit, upon the question here presented conclusive authority in favor of our contention. What was there involved was the provision of Section 1 of Title I of the Volstead Act, which by way of amendment to the War-Time Prohibition Act, prohibited the sale of beer even though it be non-intoxicating. This amendment was passed to aid in the enforcement of the prohibition against the sale of liquors

actually intoxicating which had been established by the War-Time Prohibition Act and was still in effect. That the War-Time Prohibition Act was an appropriate exercise of the war powers of Congress, and that it was still in effect at the date when the Volstead Act was passed, had been determined in *Hamilton v. Kentucky Distilleries Co.* (251 U. S. 146), upon evidence which was conclusive and reasoning which is unanswerable. The question, therefore, presented in the *Jacob Ruppert* case was whether the prohibition against certain non-intoxicating liquors attempted by the Volstead Act was in fact an appropriate means to make effective the prohibition against similar liquors actually intoxicating brought about by the War-Time Prohibition Act. In the consideration of this question the court clearly recognized the applicability and force of the principles upon which we here rely. The court in the prevailing opinion was at great pains to show by the legislation and experience of nearly all of the states of the Union that the enforcement of an act prohibiting the sale of liquors actually intoxicating is practically impossible unless aided by a further prohibition against the sale of similar though non-intoxicating liquors; and that, to say the least, such prohibition of non-intoxicating liquors of like kind is, and from experience has proven to be, an efficient aid in rendering effective the prohibition directed to liquors really intoxicating. In short, to recur to the definition of Chief Justice Marshall quoted above, in the *Jacob Ruppert* case the end was legitimate because it was to prohibit the sale of intoxicating liquors while the demobilization then in progress was going on, and so to aid in such demobilization; and the means

employed in the Volstead Act were appropriate to that end for the reasons already mentioned. But notwithstanding these considerations, four judges dissented from the decision of the majority in the *Jacob Ruppert* case whereby the statute was upheld, and in a vigorous dissenting opinion concurred in by three of the judges, it was held that even under the circumstances recited above the provisions of the Volstead Act there in question did not constitute a means appropriate to the end and so were wholly beyond the power of Congress to enact.

But when we apply these principles to the statute here in question, it must, we think, inevitably result that this statute cannot be upheld. What was the end in view when, on October 22, 1919, Congress passed this statute? It was clearly declared in the President's message of August 8, 1919, in response to which this legislation was enacted. That end was to reduce the high cost of living in this country. Was that end legitimate, in the sense in which the word is used by Chief Justice Marshall in the foregoing quotation? How can it possibly be said that the successful prosecution of the war, which had already ended, depended in any respect upon the price at which wearing apparel was sold at retail to the citizens of this country? How can it be successfully asserted that the regulation of such prices bore any relation whatsoever to any war-time activity then in progress? The statute was enacted as an amendment to the Lever Act, which had been in force throughout the war but which had not related to wearing apparel at all, its operation being confined exclusively to food products and fuel. How can it be successfully contended that the regulation of

prices at which wearing apparel shall be sold at retail in the various states of this Union can efficiently, or otherwise or at all, aid in the enforcement of any of the regulations concerning food products and fuel, which had, until October 22, 1919, been the only matters with which the Lever Act was concerned?

It is easy to perceive and must be at once conceded that the war powers of Congress extend to doing those things which may be necessary to properly demobilize, at the termination of the war, the armed forces which had been assembled for the purposes of the conflict. It is easy to perceive that prohibition of the sale of intoxicating liquors is an aid to prompt and efficient demobilization. It is not difficult to see that the prohibition of non-intoxicating liquors similar in kind and like in appearance to those which are intoxicating may be an appropriate means to render the prohibition of the latter effective.

But when Congress legislates, not for any war purpose but for the declared purpose of reducing the high cost of living in this country, and when, as here, that legislation takes the form of an attempted regulation of the price at which wearing apparel may be sold at retail in the various states of this Union and to the citizens thereof, we submit without fear of successful contradiction that Congress has invaded a field of legislation reserved exclusively to the states, and so has manifestly exceeded its powers.

This was manifest at the date when the legislation here in question was enacted. But it became more obvious as time progressed. As we have already

shown, the only thing resulting from the war which is now left undone is ratification by the Senate of the treaty of Versailles. Who will assert that the procurement of such ratification is a proper war purpose justifying the continued existence of the war powers of Congress or the enforcement of statutes passed pursuant to those powers? And who will assert that the regulation of prices at which wearing apparel may be sold at retail is an appropriate or any means to that end?

III.

THE WAR POWERS OF CONGRESS AND OF EVERY OTHER DEPARTMENT AND AGENCY OF THE FEDERAL GOVERNMENT ARE, LIKE ITS OTHER POWERS, SUBJECT TO THE APPLICABLE LIMITATIONS IMPOSED BY OTHER PROVISIONS OF THE CONSTITUTION.

But even if at the date of the enactment of the statute here in question, or since, the war powers of Congress continued, and even though the subject-matter with which that legislation dealt were in general within the scope of those powers, yet the act here in question cannot be upheld.

The war power of Congress, like its power over interstate commerce and the other powers with which it is endowed by the Constitution, is subject in its exercise to applicable constitutional limitations imposed by other provisions of that instrument. In the exertion of the war power none of these constitutional limitations can be ignored or their force and effect disregarded. The only exceptions are that

the privilege of the writ of *habeas corpus*, which, by command of the Constitution, shall not be suspended, may by express provision of that instrument be so suspended "when, in cases of rebellion or invasion, the public safety may require it" (Constitution, Article I, Section 9, Clause 2), and that Congress may in the exertion of its war power temporarily and to a limited extent invade the field of legislation otherwise expressly reserved to the states.

These principles have been conclusively established.

Ex parte Milligan (4 Wall. 2) is the leading case. In that case (pages 120, 123) it was said:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that

any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

* * *

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freedom. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Con-

gress, or the judiciary disturb, except the one concerning the writ of habeas corpus."

In *Hamilton v. Kentucky Distilleries Co.* (251 U. S. 146, at 156) it is said:

"The war power of the United States, like its other powers, and like the police powers of the states, is subject to applicable constitutional limitations (*Ex parte Milligan*, 4 Wall. 2, 121 to 127; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 336; *United States v. Joint Traffic Association*, 171 U. S. 505, 571; *McCray v. United States*, 195 U. S. 27, 61; *United States v. Cress*, 243 U. S. 316, 326;) but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. * * * If the nature and conditions of a restriction upon the use or disposition of property is such that a state could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may, for a permitted purpose, impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

And in that case the court was at pains to demonstrate that by reason of the provisions of the War-Time Prohibition Act, which granted ample time within which to dispose of stock of liquors on hand, and by reason of the well-known evil tendencies of the liquor traffic, which authorize more drastic regu-

lation, the act there in question was not in conflict with the Fifth Amendment.

Jacob Ruppert v. Caffey, 251 U. S. 264 again illustrates the recognition and application by this court of the principle upon which we here rely. In that case the court, in the prevailing opinion, was at great pains to demonstrate that the legislation there involved, which had been passed in the exercise of the war powers, was not in fact prohibited by other provisions of the Constitution. And, as we have already pointed out, this conclusion was dissented from by four judges.

It therefore follows inevitably that the statute here in question cannot be upheld if it conflicts with the provisions of the Fifth Amendment, or any other applicable provision of the federal Constitution, or if, had it been state legislation, it would have been held to be in conflict with the Fourteenth Amendment.

Failure to recognize this principle is the fundamental error which permeates and destroys the decision of the Circuit Court of Appeals for the Second Circuit in *Weed & Co. v. Lockwood*, — Fed. — (not yet reported). For, as we have already pointed out with quotation of the words used, (*supra*, page 16), the concurring opinion of his honor Judge Hough was expressly based upon the hypothesis that Congress in the exercise of its war powers is not subject to the limitations of the Fifth Amendment and other applicable provisions of the Constitution, the learned judge in terms declaring that if this had been otherwise the statute here in question must certainly be held unconstitutional. The concurring opinion of his honor Judge Ward

upon the question of the constitutionality of the act was, so far as appears, based upon the same erroneous conception of the war powers of Congress.

Failure to apply this principle is the fundamental error which vitiates the decision upholding the act here in question, made by his honor Judge Rudkin in *United States v. Spokane Dry Goods Co.* (264 Fed. 209).

IV.

THE ACT HERE IN QUESTION IS INVALID AND UNCONSTITUTIONAL BECAUSE IT FAILS TO DEFINE WITH THE REQUISITE CERTAINTY THE OFFENSE THEREBY DENOUNCED. IT THEREFORE CONFLICTS WITH ARTICLES V AND VI OF THE AMENDMENTS TO THE CONSTITUTION, IN THAT IT OPERATES TO DEPRIVE PERSONS PROTECTED BY THE CONSTITUTION OF THEIR LIBERTY AND THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND IGNORES THE CONSTITUTIONAL RIGHT OF THE ACCUSED TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION.

1. *Appellees' contention and the authorities which demonstrate its correctness.*

The importance of the point suggested in the foregoing headline cannot be too greatly emphasized. As an appeal to the court to uphold the inviolability of constitutional guaranties, it is of supreme importance because it directs the court's attention to guaranties designed to protect those things which, next

to life, are the most precious of human possessions, to-wit, liberty and property. On the material and practical side it is also of the utmost importance because it is the lack of a definition of the crime attempted to be established by this act which renders the act in its enforcement flagrantly unjust and intolerably oppressive to the merchants affected thereby. For although a merchant's business consists wholly of fixing prices and selling articles of wearing apparel in accordance therewith, and cannot be conducted at all without so doing, and although if trade is to go on these acts must be done by every merchant hundreds and even thousands of times each day, yet under the terms of the statute here in question it is impossible for any merchant to know, at the time when he fixes a price or sells an article thereat, whether or not he is violating this act. So far as the language of the act goes, intent is not an element of the offense which it seeks to create. It follows that no merchant, however well intentioned or however earnest and honest his effort may be to fix only such rates and charges as are in his judgment just and reasonable, can conduct his business at all except at the risk of being indicted and perhaps convicted for violation of this statute and subjected to the heavy penalties by fine and imprisonment which it imposes, upon every one of the numerous and almost innumerable transactions in which he does and must daily participate, if the judgment of someone else, perhaps not so well advised, and later formed, should differ from his own respecting the justness or reasonableness of the rate or charge.

The language of the act by which alone the offense is sought to be created, for the commission of

which retail merchants in wearing apparel are to be prosecuted, is this (41 Stat., 298):

"That it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; * * * Any person violating any of the provisions of this section, upon conviction thereof shall be fined not exceeding five thousand dollars, or be imprisoned for not more than two years, or both."

When we consider that this is a case of *malum prohibitum* and not *malum in se*, and that the statute in its application to merchants dealing at retail in wearing apparel (if it be so applicable at all), concerns a business which is not only without evil tendencies but highly commendable, the necessity for a clear definition of the supposed offense is emphasized.

No one can read the words of the statute quoted above without being at once impressed with the fact that it defines no offense at all; or, if it does, that the definition falls far short of the requirements directly imposed by the constitutional provisions to which we have referred.

It was upon this ground that his honor, Judge Faris, in *United States v. L. Cohen Grocery Co.*, 264 Fed. 218, and his honor, Judge Tuttle, in *Detroit Creamery Co. v. Kinane*, 264 Fed. 845, and his honor, Judge Dooling, in *United States v. Peoples Fuel & Feed Co.*, — Fed. — (not yet reported), and his honor, Judge Evans, in his charge to the Grand Jury in Kentucky (not reported), and his honor, Judge Thompson, in *Lamborn vs. McAvoy*, 265 Fed.

944, held the act unconstitutional. We can add nothing to the discussion of the subject contained in the opinions of these learned judges.

Article V of the Amendments to the Constitution provides:

"No person shall be * * * deprived of life, liberty or property without due process of law."

Article VI of said Amendments provides:

"In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation."

From the beginning of the judicial history of this nation, this Court and the other federal courts have by repeated decisions firmly established and constantly adhered to the doctrine that these constitutional provisions imperatively require the statutory definition of a crime to be so clear, positive and distinct that any one, at the time of the commission of an act, may know with certainty whether it falls within or without the statutory prohibition.

Tozer v. United States, 52 Fed. 917, is a case directly in point. It involved an indictment for violation of the original Interstate Commerce Act. Defendant was convicted in the District Court and the case came to the Circuit Court for review upon writ of error. The Circuit Court was held by Circuit Justice Brewer and Circuit Judge Caldwell. The judgment of conviction was reversed. Mr. Justice Brewer, speaking for the court, said (page 919):

"But, in order to constitute a crime, the act must be one which the party is able

to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of *Railway Co. v. Dey*, 35 Fed. Rep. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:

"Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In *Dwar. St.* 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke that the acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in legal matters.' See also, *U. S. v. Sharp, Pet.*, C. C. 122; *The Enterprise*, 1 Paine, 34; *Bish. St. Crimes*, Sec. 41; *Lieb. Herm.* 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with

eighty blows.' There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate. See another illustration in *Ex parte Jackson*, 45 Ark. 158."

As a further illustration, the learned judge might well have referred to the tyrannical practice of one of the Roman emperors, who, it is said, caused his decree to be written in very small characters and posted at the top of very high columns so that they could not be read, and then put to death those who violated their mandates.

Indeed, as was said by his honor, Judge Faris, in *United States v. L. Cohen Grocery Co.*, 264 U. S. 218, at 223, referring to the precise statutory provision here in question:

"If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute declaring that any person who shall commit an unjust or unreasonable act, or a wrongful or criminal act, shall be deemed guilty of felony, and leave it to the jury to determine what is unjust or unreasonable, wrongful or criminal."

In *The Enterprise*, 1 Paine 32, 8 Fed. Cases 732, at 734, decided in 1810, Circuit Justice Livingston said:

"It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promul-

gated in terms which leave no reasonable doubt of their meaning. * * * If this be involved in considerable difficulty from the use of language not perfectly intelligible, unusual circumspection becomes necessary—especially if the consequences be so penal as scarcely to admit of aggravation * * * It will at once be conceded that no man should be stripped of a very valuable property—perhaps his all—he disfranchised and consigned to public ignominy and reproach, unless it be very clear that such high penalties have been annexed by law to the act which he has committed. 'It is more consonant to the principle of liberty,' says an eminent English judge, 'that a court should acquit when the legislature intended to punish, than that it should punish when it was intended to discharge with impunity.' "

In *United States v. Sharp*, Pet. C. C. 118, 27 Fed. Cases 1041, at 1043, decided in 1815, Circuit Justice Washington said:

"If we resort to definitions given by philologists, they are so multifarious and so different that I cannot avoid feeling a natural repugnance to selecting from this mass of definitions one which may fix a crime upon these men, and that, too, of a capital nature; when, by making a different selection, it would be no crime at all, or certainly not the crime intended by the legislature. Laws which create crimes ought to be so explicit in themselves or by reference to some other standard, that all men subject to their penalties may know what acts it is their duty to avoid."

In *United States v. Reese*, 92 U. S. 214, at 219, Mr. Chief Justice Waite, speaking for the court, said:

"Laws which prohibit the doing of things and provide a punishment for their violation should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. * * * (page 220.) If the legislature undertakes to define by statute a new offense and provide for its punishment, it would express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. * * * (page 221.) It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leaving it to the courts to step inside and say who could be rightfully detained and who should be set at liberty."

In *United States v. Brewer*, 139 U. S. 278, at 288, Mr. Justice Blatchford, speaking for the court, said:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid. *U. S. v. Sharp*, Pet. C. C. 118. Before a man can be punished his case must be plainly and unmistakably within the statute."

In *Todd v. United States*, 158 U. S. 278, at 282, Mr. Justice Brewer, speaking for the court, said:

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute." *United States v. Lacher*, 134 U. S., 624; *Endlich on the Interpretation of Statutes*, Section 329, 2nd Ed.; *Pomeroy's Sedgwick of Statutory and Constitutional Construction*, 280."

In *James v. Bowman*, 190 U. S. 127, at 142, the court, again speaking through Mr. Justice Brewer, said:

"At the same time, it is all important that a criminal statute should define clearly the offense which it purports to punish, and that when so defined, it should be within the limits of the power of the legislative body enacting it."

Missouri Pacific Ry. vs. Nebraska, 217 U. S. 196, involved a statute of Nebraska requiring railroad companies to make switch connections with grain elevators under certain conditions and imposing a penalty of five hundred dollars for a failure so to do. The statute was attacked because prohibited by the Fourteenth Amendment, and the court held it to be invalid for that reason, in that it did not afford due process of law. In the course of the opinion the

court, speaking through Mr. Justice Holmes, said (page 207) :

"So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed as by implication confining their requirements to *reasonable* demands. * * * But if the statute is to be stretched, or rather shrunk to such demands as ultimately may be held reasonable by the state court, still it requires too much. * * * And moreover, even on this strained construction, they (the railroads) refrain from paying at the peril of a fine if they turn out wrong in their guess that in the particular case the court will hold the demand not authorized by the act. If the statute makes mere demand conclusive, it plainly cannot be upheld. If it requires a side-track only when the demand is *reasonable*, then the railroad ought at least to be allowed a hearing in advance to decide whether the demand is within the act. * * * (Page 208.) In this case there is no emergency, yet at the best the owner of the property, if it has any remedy at all, acts at its risk, not merely of being compelled to pay both the expense of building and the costs of suit, but also of incurring a fine of at least five hundred dollars for its offense in awaiting the result of a hearing."

But in the case at bar the statute is so framed that the merchant cannot possibly await the result of a hearing. He must fix prices and sell his goods or stop business entirely. And unless he does the latter, he incurs the risk with respect to every sale he makes, not merely of a fine of five hundred dollars,

but one of five thousand dollars, and in addition imprisonment for two years.

Nash v. United States, 229 U. S. 373, was decided June 9, 1913, the opinion being delivered by Mr. Justice Holmes. This is the case chiefly relied upon by appellant to oppose the contention which we are here making. It is clearly distinguishable, we think, upon grounds which conclusively appear from the opinion itself and from a consideration of the subject-matter involved. This phase will be hereinafter separately dealt with. But at this point we desire to emphasize the thought that it was not and could not have been the purpose of the learned writer of the opinion in the *Nash* case to destroy by that decision the constitutional principle which he himself had so carefully expounded and so rigidly applied a short time before in the *Missouri Pacific* case last above cited, and which, as we shall presently show, he again expounded and applied only a few months after the date of the decision in the *Nash* case, and which, as we have already shown and will further show, has been firmly established by the long line of decisions of this Court which have been and will be referred to.

Chicago, Milwaukee & St. Paul Railroad Co. v. Pelt, 232 U. S. 163, decided January 26, 1914, involved the validity under the Fourteenth Amendment of a statute of South Dakota making the railroad company absolutely liable for damages caused by fire, and further making it liable for double the amount of damage unless it pay the full amount within sixty days from notice, and requiring it to tender within such sixty days the full amount of said damage, or in case it did not so tender or tendered

less than the amount ultimately recovered, to suffer the penalty. The court, speaking through Mr. Justice Holmes, who had seven months before delivered the opinion in *Nash v. United States*, *supra*, said (page 167):

"The defendant in error presented no argument, probably because he realized that under the recent decisions of this court the judgment could not be sustained. No doubt the states have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand."

But in the case at bar, if a jury at a later date should find and declare that a rate or charge fixed by a merchant was even one cent more than that which the jury in its judgment considered just and reasonable, the merchant is subjected not merely to the relatively unimportant civil liability, considered in the case above cited, but to a fine of five thousand dollars and imprisonment for two years for every rate or charge fixed by him, concerning which a jury might later make such a finding. And is it not clear from the words of Mr. Justice Holmes, just quoted, that the language employed by him in deciding the *Nash* case was never intended to apply to such a situation as that with which the Court is confronted in the case at bar?

In *International Harvester Co. v. Kentucky*, 234

U. S. 216, decided June 8, 1914, within a year after the decision in the Nash case, the opinion of the court was again delivered by Mr. Justice Holmes. The case involved the penal provisions of the Kentucky anti-trust statutes, which prohibited, under penalty, any combination "for the purpose or with the effect of fixing a price that was greater or less than the real value of the article," that is, "its market value under fair competition and under normal market conditions." The question presented was as to the validity of these provisions under the Fourteenth Amendment, and against the charge that they did not afford due process of law. The court, speaking through Mr. Justice Holmes, condemned the statute for the reason assigned. To appreciate its full purport, the opinion must be read at length. But Mr. Justice Holmes, speaking for the court, said in part (page 221):

"The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know. * * * (Page 222.) Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain. But what it would be with such increase of a never-extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and it would seem, with exclusion also of any increased efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community,

is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. * * * (Page 233.) It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand."

But here we find the court, in spite of the previous decision in the Nash case, *supra*, again applying the principle for which we here contend, and speaking in both cases through Mr. Justice Holmes. Evidently the effect of the decision in the Nash case was not to destroy or modify the principle, but only to hold that it was there inapplicable for special reasons referred to in the opinion and upon which we shall hereafter comment. In short, the existence of the principle was recognized but it was held inapplicable in the Nash case and applied in the International Harvester case and in the Chicago, Milwaukee & St. Paul Railroad case, *supra*, because of the relative ease of determining the standard of conduct in the one and the relative difficulty of making that determination in the others. But if the determination in that regard necessary under the Kentucky statute involved in the International Harvester case was difficult, that required under the statute here involved is doubly so. This we shall presently demonstrate. Evidently in the International Harvester case, Nash v. United States had been cited as an authority to sustain the statute there involved. But it was distinguished in words which will be

commented upon when we come to deal specifically with that decision.

Collins v. Commonwealth of Kentucky, 234 U. S. 634, decided June 22, 1914, involved a similar attack upon another penal statute of Kentucky almost identical in character with that involved in the International Harvester Company's case, *supra*. The court condemned the statute as in conflict with the Fourteenth Amendment, saying (page 637) :

"As the present prosecution was under this legislation thus construed as constituting in effect a single act, the question presented is the same as that decided by this court in *International Harvester Co. v. Kentucky* (ante, page 216). It was found that the statute in its reference to 'real value' prescribed no standard of conduct that it was possible to know; that it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men, on peril of indictment, to guess what their goods would have brought under other conditions not ascertainable. * * * The objection that the statute, by reason of its uncertainty, was fundamentally defective, was as available to *Collins* as it was to the Harvester Company."

American Seeding Machine Co. v. Kentucky, 236 U. S. 660, decided March 15, 1915, likewise involved the validity, as against the Fourteenth Amendment, of the penal provisions of the anti-trust statute of Kentucky, and the decision was to the same effect as those which had preceded.

United States v. Pennsylvania Railroad Co.,

242 U. S. 208, decided December 11, 1916, related to an order of the Interstate Commerce Commission and its validity under the Fifth Amendment, in view of the uncertainty of its terms and the fact that the Interstate Commerce Act provided a heavy penalty for failure to observe such orders. The court, speaking through Mr. Justice McKenna, said (page 237) :

"Again, it is charged that the order expressed but a legislative principle, has the generality of such principle without any criterion of application. The order requires the company to 'provide * * * upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.' What is a reasonable request or reasonable notice, and what are normal shipments. The order affords no answer, and if the railroad company ventures, however honestly, any resistance to a request or notice, not deemed reasonable, or to shipments not deemed normal, it must exercise this right at the risk of a penalty of five thousand dollars a day against all of its responsible officers and agents. These considerations are very serious. (*International Harvester Co. v. Kentucky*, 234 U. S. 216; *Collins v. Kentucky*, 234 U. S. 634). But the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions."

But in the case at bar the merchant must exercise his right to sell his goods, without which he

cannot conduct his business at all, at the risk not only of a great pecuniary penalty but also imprisonment for a long term, both of which may be imposed for every rate or charge fixed by him, however reasonable or just he may honestly have deemed them to be.

The foregoing review of the decisions of this Court render it certain, we submit, that by application of the principle which they conclusively declare, the statute here involved must be held unconstitutional for the reason here assigned. Moreover, the decisions of this Court, rendered both before and since the decision in the case of *Nash v. United States*, *supra*, as well as the language of the opinion in that case itself and a consideration of the subject matter to which it applied, render it equally certain, we think, that nothing contained in the opinion in the *Nash* case does or can in any manner affect this result.

The principles thus enunciated have been repeatedly applied by the lower federal courts and by the courts of the several states, and as a result statutes not so lacking in definiteness as that here involved have time and again been declared unconstitutional.

Louisville & Nashville Railroad Co. v. Railway Commission of Tennessee, 19 Fed. 679, decided in the Circuit Court for Tennessee by Circuit Judge Baxter and District Judges Hammond and Key, concerned the penal provisions of the Railroad Commission Act of Tennessee. This act provided for the imposition of a penalty in case the charges imposed by the railroad were "unjust and unreasonable" or "amounted to unjust and unreasonable discrimina-

tion." The court held the penalty provisions of the act wholly invalid for indefiniteness. In the course of the opinion, Circuit Judge Baxter said, in part (page 692) :

"We think the property of a citizen—and a railroad corporation is in legal contemplation a citizen—cannot be thus imperiled by such vague, uncertain, and indefinite enactments. The corporations and persons against whom this act is directed can do nothing under it with reasonable safety. They may take counsel of the commission, act upon their advice, and honestly endeavor to conform to the statute. But if a jury before whom they may be subsequently arraigned, shall, in their judgment, and upon such arbitrary basis as they are at liberty to adopt, conclude that the commissioners misadvised or that the managers of the accused railroad corporation made a mistake in regulating their charges upon a five per cent, instead of a four per cent, basis, the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendants' property shall be gradually transferred to the public. This cannot be permitted. Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury."

A fortiori must this be true where the prescribed penalty is imprisonment as well as fine.

See also *United States v. Louisville & Nash-*

ville Railroad Co., 176 Fed. 942, 944 and cases there cited.

In *Louisville & Nashville Railroad Co. v. Commonwealth*, 99 Kentucky 132; 35 S. W. 129, 33 L. R. A. 209, the gist of the decision is thus stated in the syllabus:

"A statute imposing a penalty for charging more than just and reasonable compensation for the services of a carrier, without fixing any standard to determine what is just and reasonable, thus leaving the criminality of the carrier's act to depend on the jury's view of the reasonableness of a rate charged, is in violation of the constitutional provision against taking property without due process of law."

In the course of the opinion it is said (33 L. R. A. 211):

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony as to whether or not an offense has been committed must also be conceded. The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that par-

ticular case, as another jury may take a different view, and holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime. If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic laws."

United States v. Capitol Traction Co., 34 Appeal Cases (D. C.) 592, 19 A. & E. Ann. Cases, 68, was a decision by the Court of Appeals of the District of Columbia holding that an act of Congress "making it an offense for a street railway company to fail to supply a sufficient number of cars to accommodate all persons desirous of using the cars 'without crowding said cars,' but which does not define 'crowding,' is too indefinite to be enforced, since an indictment under it would not comply with the constitutional requirement (Const. U. S., Amendment VI) that the accused shall 'be informed of the nature and cause of the accusation.'"

The opinion is exceedingly interesting, cites numerous authorities, including the decisions of many state courts of last resort, and every part has value. We quote only a few extracts, as follows (page 595):

"The Sixth Amendment to the Constitution of the United States, among other things, provides that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation." In other words, when the accused is led to the bar of justice, the information or indictment must contain the elements of the offense with which he is charged with sufficient clearness to fully advise him of the exact crime which he is alleged to have committed. To ascertain the possibility of framing such an information, we must look to the statute creating the offense. We are here dealing with a statutory and not a common law offense. The information cannot rise higher than its source—the statute. * * * (page 596.) There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture or be supplied by either the court or the jury. It is of the very essence of the law itself and without it the statute is too indefinite and uncertain to support an information or indictment."

Again, quoting from its prior decision in *Czarra v. Medical Supervisors*, 24 Appeal Cases (D. C.) 443, the court says (page 598):

"In all criminal prosecutions the right of the accused to be informed of the nature and cause of the accusation against him is

preserved by the Sixth Amendment. In order that he may be so informed by the indictment or information presented against him, the first and fundamental requisite is that the crime or offense with which he stands charged shall be defined with reasonable precision. He must be informed by the law, as well as by the complaint, what acts or conduct are prohibited and made punishable. In the exercise of its power to regulate the conduct of the citizen within the constitutional limitations, and to declare what shall constitute a crime or punishable offense, the legislature must inform him with reasonable precision what acts are intended to be prohibited."

Again (page 598):

"The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing punishment for their violation should not admit of such a double meaning that citizens may act upon the one conception of its requirements and the courts upon another."

Decisions by the highest courts of the several states, almost without number and to the same effect, might be cited. But certainly it is unneces-

sary. So general is the rule and so rigid its application that the settled law which everywhere obtains is thus stated in a recent authoritative treatise (*Ruling Case Law*, Vol. 8, p. 58, Sec. 8) :

"In the exercise of its power to declare what shall constitute a crime or punishable offense, the legislature must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain rule of conduct. Hence, the making of an unreasonable charge for services cannot be made criminal under a statute creating no test of reasonableness in this respect."

No case can be imagined which more clearly and imperatively demands the application of the rule conclusively established by the foregoing authorities than that at bar. This is emphasized by the fact that, as is alleged in the complaint (*Record*, p. 9, paragraph VI), and admitted in the answer (*Record*, pp. 23-24, paragraph VI), notwithstanding the provisions of the first section of said act, which purport to authorize such a course, no regulations with respect to wearing apparel have been made and no order or orders issued and no prices, rates or charges whatsoever fixed or attempted to be fixed, either by the President or on his behalf or under his authority, or otherwise. There is therefore not even the semblance of a guide for the application of the drastic criminal provisions of the statute. There is an utter lack of standard or criterion, either real or fancied. There is not even a suggestion as to a starting point in attempting to make the determination which the act requires. No merchant in fixing

a rate or charge knows or can know where to look or what to seek for guidance. No judge before whom a merchant may be brought for trial because of an alleged violation of this act can possibly instruct a jury as to the elements of the offense or the proof necessary to sustain a conviction.

If it be said that it was the purpose of Congress to leave these things to the determination of the jury, so that in each case the jury becomes its own judge as to what does or does not constitute the statutory offense and for each case fixes the elements thereof, the obvious answer is that such a course is not permissible under the constitutional provisions to which we have already referred, and that even if this were otherwise, such a course would amount to the delegation by the legislative to the judicial department of a function purely legislative in character, contrary to those provisions of the Constitution which prohibit such delegation and forbid the encroachment of one department of the federal government upon the province of another. Moreover, such a course would be subject to the further obvious objection that to permit a jury in each particular case to establish standards of its own, and by their application to acts which had previously occurred to make those acts criminal, would be to authorize the passage of an *ex post facto* law contrary to the express provision of Article I, Section 9, Clause 3 of the Constitution.

In concluding upon this branch of the case, we cannot do better than to quote the language of his honor, Judge Tuttle (which condemns the very provision of the act here in controversy) in *Detroit Creamery Co. v. Kinane*, 264 Fed. 845, at 850. In this connection we emphasize the fact that the De-

troit Creamery Co. case related to the fixing of a price for a single commodity, to-wit, milk, whereas the case at bar involves the fixing of prices for the almost numberless different commodities of which a merchant's stock consists. The difficulties emphasized in that case are many times multiplied in this. The language of the learned judge was as follows:

"What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are

differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which a rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?

"These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the criminality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed. We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps court, before which the accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion or opinion of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I cannot avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law."

2. *Nash v. United States*, 229 U. S. 373, and other cases cited by appellant distinguished.

The principal, and practically the only case relied upon by appellant to meet the contention just discussed, is *Nash v. United States* (229 U. S. 373).

But the foregoing review of the decisions of this Court, rendered both before and after that in the *Nash* case, in some of which, both theretofore and thereafter, the opinions were delivered by the same learned justice who delivered that in the *Nash* case, demonstrates, we think, with absolute certainty that the court did not intend by its decision in the *Nash* case to modify, weaken or in any degree lessen the force of the principle otherwise so thoroughly settled and upon which we here rely.

If further demonstration of this obvious fact were necessary, it would be at once supplied by a consideration of the language and reasoning employed in the opinion in the *Nash* case and the subject-matter to which that case related.

In the *Nash* case the court was reviewing a judgment of conviction which had occurred under an indictment in two counts—the first for a conspiracy in restraint of trade, the second for a conspiracy to monopolize trade, contrary to the provisions of the Sherman Anti-trust Act. It appears (229 U. S. 374) that originally there was a third count for monopolizing, apparently not involving the element of conspiracy, but it was held bad on demurrer and was stricken out. This fact Judge Faris, in *United States v. L. Cohen Grocery Co.* (264 Fed. 218, 221), evidently regarded as having some significance. In any event, the two counts of the indictment considered by this Court both charged conspiracy, in the

one instance in restraint of trade and in the other to monopolize trade. And herein lies the first distinction between the Nash case and the one at bar. A conspiracy in restraint of trade or a conspiracy to monopolize trade, even though the course of trade be not unduly obstructed or competition unduly restricted thereby, is, in and of itself, reprehensible even if it be not criminal. It offends the moral sense of civilized society and is unconscientious, even if it be not illegal. Although under the decisions in the Standard Oil and American Tobacco Co. cases (221 U. S. 1 and 106), not all such conspiracies, contracts and combinations are condemned as criminal, yet the fact remains that anyone entering such a conspiracy or becoming a party to such a contract or combination knows that from the moment he does so he is skating on thin ice, with the danger sign displayed in full view. Conspiracies, contracts or combinations in restraint of trade, or to monopolize trade, are not essential to the conduct of any business. Trade can go on and business be successfully conducted without them. But no one engaging in business as a retail merchant of wearing apparel is warned by the common conscience of mankind or otherwise that he is doing anything reprehensible. Quite the contrary is true. And no merchant so engaging can conduct his business at all without fixing prices and making sales, for without these acts trade must wholly stop. It follows, therefore, that at the very threshold of the Nash case a distinction is found, which, as it seems to us, renders that decision wholly inapplicable as an authority here.

But this is by no means all. In the Standard Oil and American Tobacco Co. cases (221 U. S. 1

and 106), it had been held that not all contracts and combinations in restraint of trade, or directed to monopolization, are by the Sherman Act denounced as criminal conspiracies, but only those which (229 U. S. 376), "by reason of intent or the inherent nature of the contemplated acts prejudice the public interests by *unduly* restricting competition, or *unduly* obstructing the course of trade." As we have already pointed out, intent is not, by the language of the act here in question, made an element of the offense, nor is there anything in the inherent nature of the business of dealing at retail in wearing apparel prejudicial to the public interests. But when we read the decisions of this Court in the Standard Oil and American Tobacco Co. cases, it becomes clearly apparent that the court did not thereby emasculate the Sherman Anti-trust Act by removing therefrom every standard or criterion by which to determine the guilt or innocence of one accused thereunder. On the contrary, by reference to the common law and the rules and principles thereby firmly established and readily ascertainable, the court pointed out distinctly and with the utmost precision the standard and criterion to be applied in making that determination. As was said by Mr. Justice Holmes in delivering the opinion in the Nash case (229 U. S. 377), the "common law as to restraint of trade" was "thus taken up by the statute." But where, in the common law or elsewhere, can there be found any standard or criterion by which to determine whether a particular rate or charge fixed in handling or dealing in or with wearing apparel is reasonable or unreasonable, just or unjust?

Everyone of the illustrations employed by Mr. Justice Holmes in the opinion in the Nash case (229 U. S. 377) involved an act occasional and sporadic in character, wholly outside of the usual activities of human life, and so reprehensible, not to say criminal, in its nature as to be opposed to the common conscience of mankind. In respect to everyone of them, the extent of criminality involved was measurable by the degree of criminal intent or malice, or the degree in which reckless disregard of the lives and safety of others existed. And in every one of them the determination of this question of degree was referable to fixed standards, established either by abundant precedent or by express statute. No trial judge called upon to instruct a jury in a criminal case could be in doubt as to the elements which constitute murder, man-slaughter or criminal negligence, or the differences in malice, intent or recklessness which differentiate the one from the other. But what trial judge can know what, under the statute here involved, distinguishes a rate or charge which is just and reasonable from one which is unjust or unreasonable, and where can he look for any standard or criterion by which to determine this question? And if this be the dilemma of a trial judge, trained in the science of the law, what is to be said of that in which a merchant is placed, who, hundreds and even thousands of times each day, is called upon to make this determination?

The opinion in the Nash case (229 U. S. 377), cites but does not disapprove the decision of Mr. Justice Brewer in *Tozer v. United States*, 52 Fed. 917 (cited *supra*), and upon this point concludes in these words: "But without further argument the

case is very nearly disposed of by *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U. S. 86, 109, where Mr. Justice Brewer's decision, and other similar ones, were cited in vain."

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, which in the language just quoted is by reference made a part of the opinion in the *Nash* case, related to the enforcement by civil remedies of the provisions of an anti-trust law of Texas. The part of the opinion thus referred to begins on page 108. The Texas statutes involved were objected to as unconstitutionally vague, indefinite and uncertain because one of them denounced contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, etc., and the other prohibited acts which "tend" to accomplish the prohibited results. The difference between those statutes and the one here involved is at once plainly perceptible. As the court pointed out, these Texas statutes, by the language quoted, did nothing more than to bring into the written law that body of law relating to attempts, which is well settled and well understood. In the course of the opinion, however, the court cited *Tozer v. United States*, 52 Fed. 917, *Railway Co. v. Dey*, 35 Fed. 866, and *Louisville & Nashville Railway v. Commonwealth*, 99 Ken. 132, all of which have been hereinbefore cited by us, and everyone of which related to a statute framed in exactly the same words as that which is here involved. These decisions were not disapproved, but, on the contrary approved, though distinguished, by this Court in these words (212 U. S. 109):

"But the Texas statutes in question do not give the broad power to a court or jury

to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

The quoted words clearly show the distinction between the case at bar and that in which they were used, and also between the case at bar and the Nash case. Rightly considered, the Waters-Pierce Oil Co. case is, we submit, conclusive authority in support of the contention which we are here making.

But this is not all. In *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223 (cited *supra*), *Nash v. United States* is expressly distinguished. Referring to that case and the criterion by reference to which the determination there required is to be made, Mr. Justice Holmes, again delivering the opinion of the court, says (234 U. S. 223) :

"The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it *and must sell their wares*. To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (Italics are ours.)

These words are distinctly applicable to the

case at bar. They emphasize the difficulty of making the determination required under the statute involved in the International Harvester Co. case, as compared with that required under the statute involved in the Nash case. But the difficulties in that regard which influenced the decision in the International Harvester Co. case are mild compared with those presented in the case at bar.

The determination which the merchant is here required to make, at the risk of fine and imprisonment if he be mistaken in his judgment, is as to whether or not a particular rate or charge is just or reasonable. An analogy is to be found in that large class of cases which of recent years have come before the courts, involving the question as to whether rates for public utility service fixed by governmental authority are so low as to be confiscatory. The difficulty of making that determination has many times been emphasized by this Court.

In *United States v. Trans-Missouri Freight Association* (166 U. S. 290, at 331), it is said:

"It is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty."

In *Smyth v. Ames* (169 U. S. 466, at 546), the court, referring to the question as to whether the total yield from an entire body of rates was or was not so unreasonably low as to be confiscatory, said:

"How such compensation may be ascertained and what are the necessary elements in such an inquiry will always be an embarrassing question."

In *Home Telephone Co. v. Los Angeles* (211 U. S. 265, at 280), the court, referring to the fixing of rates for public utility service by process of initiative, said:

"It may well be doubted whether such a result was contemplated by the legislature. There are certainly grave objections to the exercise of such a power, requiring a careful and minute investigation of facts and figures, by the general body of the people, however intelligent and right-minded."

In *Knoxville v. Knoxville Water Co.* (212 U. S. 1, at 18), the court referred to the fixing of rates for public utility service as "a delicate and dangerous function."

In *Cumberland Telephone & Telegraph Co. v. Railroad Commission* (156 Fed. 823, at 828), the court, after reciting a few of the many difficulties and uncertainties which beset the fixing of reasonable rates for public utility service, said:

"All these and many other questions of fact must be most carefully investigated and considered before any commission can act intelligently and with any likelihood of success in the matter of establishing 'reasonable and just rates, charges and regulations' for public service corporations. Even when all the facts which should enter into the discussion and control the decision have been ascertained with the utmost possible care and exactness, the conclusion is still doubtful in many cases. Where the facts are not known or inquired into, the regulations made by any commission would be mere arbitrary edicts, or at best only

conjectures made in good faith and tested at the expense of the regulated corporations."

See also Beale & Wyman on Railroad Rate Regulation, 2nd Ed., page 186, Section 219.

The difficulty of making the requisite determination, even where the only question involved is whether or not the total yield from an entire body of rates is so low as to be confiscatory, is emphasized by the decisions of this Court, in which the decrees of trial courts have been reversed solely because the matter was not referred to a skilled master for an exhaustive examination.

Chicago, Milwaukee & St. Paul Co. v. Tompkins, 176 U. S. 167, 179;

Lincoln Gas & Elec. Co. v. Lincoln, 223 U. S. 349, 361.

It is also emphasized by the fact that the decrees of trial courts enjoining as confiscatory the enforcement of a rate schedule have by this Court on several occasions been set aside solely for the purpose of permitting the statutory rates to be tried in actual practice and the propriety of the trial court's determination that they were confiscatory tested by actual experience.

But the difficulties attendant upon making the determination involved in a suit wherein it is charged that the rates are so low as to be confiscatory, great as they are, are incomparably less than those involved in making the determination requisite under the statute with which we are concerned.

In confiscation cases it is the yield from the entire body of rates and not any single rate or charge which is involved. Here the determination must be made as to each particular rate or charge. As is obvious, and as stated in Beale & Wyman on Railroad Rate Regulation, page 194, Section 228, "The question of the reasonableness of any separate rate is a much more complex one."

In confiscation cases there is a fixed and well recognized standard by which to determine whether or not the net yield from the rates in controversy is or is not so unreasonably low as to be confiscatory, to-wit, the relationship between that net yield and the present fair value of the property then being devoted to the public service. But in the case at bar there is no such standard, nor any other. This statute says nothing about net yield or profit of any character, and, so far as its language goes, relates not at all to earnings from the entire business, but only to a particular rate or charge.

In confiscation cases only one commodity is involved, to-wit, the service which the utility affords, and the criteria by which to determine whether the rate or charge established is or is not confiscatory are fixed and constant. But in the case of each merchant, hundreds and perhaps thousands of different articles which constitute his stock are involved and the elements which enter into the solution of the question as to whether a rate or charge fixed for any one of such articles is or is not just and reasonable are many, variable and exceedingly difficult to ascertain. That this is especially true in respect to wearing apparel, particularly that of women, is at once obvious when we consider the effect upon the pub-

lie's desire to purchase of the element of style, which is exceedingly variable, subject to sudden and wholly unaccountable changes and fluctuations, with the result that frequently large stocks are left on the hands of merchants wholly unsalable or salable only at prices greatly less than cost.

Finally, the question in confiscation cases is solely whether the total net yield from an entire body of rates falls within or without the line which separates that which is confiscatory from that which is not; in other words, whether the rates are so unreasonably low as to be confiscatory, and not whether they are, in and of themselves, just and reasonable in a general sense. But who would maintain that rates and charges which are barely high enough to escape the charge of confiscation are the only ones which are in the general sense reasonable and just, or that if they exceed by one cent the point of being non-confiscatory, they thereby become unreasonable and unjust? Certainly it must be clear that between rates which are so low as to be confiscatory and rates which are so high as to be in a general sense unreasonable and unjust, there is a broad range. And within this range there is no standard and no criterion which it is possible to know.

It is the latter determination, and not the former, which the merchant is called upon to make each time he consummates one of the hundreds or even thousands of transactions which constitute his daily business, and every such determination must be made by him at the risk of fine and imprisonment if a jury should thereafter determine that he was mistaken in his judgment.

It follows inevitably, we think, that this case is,

and must be, ruled, not by *Nash v. United States*, *supra*, but by *International Harvester Co. v. Kentucky*, *supra*, and the decisions which followed and preceded it declaring the same principle.

Appellant cites certain other decisions of this Court, but they are readily distinguishable.

Fox v. Washington, 236 U. S. 273, involved a conviction under a statute of the State of Washington which prohibited wilfully printing or publishing, or knowingly circulating or selling, any book, paper or document "advocating, encouraging or inciting, or having a tendency to encourage or incite, the commission of any crime," etc. As this Court said (page 277), the state court had construed the statute "as confined to encouraging an actual breach of law;" and as so construed, "it lays holds of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of misdemeanor, if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar." As thus construed, the statute related to conduct which encourages crime, in the sense that it aids or abets it. And the rules which govern the determination of guilt under such a statute are well settled and well known.

Miller v. Strahl, 239 U. S. 426, did not involve a criminal charge. It involved only a civil liability for damages alleged to arise from the breach of a duty imposed upon hotel keepers by a statute of Nebraska relating to precautions which they should take in case of fire. After prescribing certain specific precautions, the statute concludes as follows:

"It shall be the duty of every proprietor or keeper of such hotel or lodging house, in case of fire therein, to give notice of same to all guests and inmates thereof at once, and to do all in their power to save such guests and inmates."

But, as this Court pointed out (page 434), the statute does no more than to impose upon innkeepers, in case of fire, the duty to exercise the high degree of diligence which, under the common law, arises from many other human relationships. That such a decision has no application here is manifest. It is also significant that the opinion therein was delivered by Mr. Justice McKenna, who, less than a year thereafter, likewise delivered the opinion of the court in *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208 (cited *supra*, page 123), wherein the rule relied upon by us and the necessity of applying it to such a case as that at bar is strongly emphasized.

Omachevartin v. Idaho, 246 U. S. 313, involved a statute of the State of Idaho making it a misdemeanor for any owner or herder of sheep to herd or pasture the same "on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower." The statute was attacked for uncertainty because it failed to provide for the ascertainment of the boundaries of the range or for determining what length of time is necessary to constitute a prior occupation a usual one within the meaning of the act. But as this Court observed (page 348), "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it." That

this is certainly true, every western man knows. But as this Court also pointed out (page 348), any danger to sheep men which might otherwise arise from indefiniteness is removed by the provision of the Idaho statutes that:

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence."

As we have already pointed out, there is no such provision in the act here involved. Apparently under this act a merchant may be a criminal and subject to its heavy penalties, although he has honestly and conscientiously used the utmost care to fix only such rates and charges as are just and reasonable.

Arizona Employers Liability Cases, 250 U. S. 400, is also cited by appellant. But this decision related solely to a new civil liability imposed by a statute of Arizona. There was no question of crime or penalty or definition of an offense. The sole question was whether the legislature of Arizona could, within constitutional limitations, make an employer liable in compensatory damages for the accidental personal injury or death of an employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, but not caused by the employee's own negligence. The court held that such legislation was not prohibited by the Fourteenth Amendment. Clearly, such a decision can have no application here. The quotation made by appellant is from the specially concurring opinion of Mr. Justice Holmes, and the only statement therein contained which is at all relevant to the

present discussion is this "There are cases in which even the criminal law requires a man to know facts at his peril." But certainly it cannot be justly said that this general observation made *arguendo* in a case not involving the criminal law supports in any way the argument of appellant or detracts in the slightest degree from that of appellees.

V.

THE STATUTE IN QUESTION IS ARBITRARY CLASS LEGISLATION AND THEREFORE DOES NOT AFFORD THE DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT.

It was upon the point suggested by the foregoing headline that his honor, Judge Anderson, in the District Court for Indiana, declared unconstitutional the precise provisions of the statute here involved.

United States v. Armstrong 265 Fed. 683, 689, *et seq.*

In the opinion of Judge Anderson cited above, the discussion of this subject is complete and convincing and supported at every stage by the citation of abundant authority. We can add little to what was there said.

Section 4 of the Lever Act, as amended by the Act of October 22, 1919 (41 Stat., 298), reads, so far as material here, as follows:

"That it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling

or dealing in or with any necessities;
 * * * provided that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman or other agriculturist with respect to the farm products produced or raised upon land owned, leased or cultivated by him: provided further, that nothing in this act shall be construed to forbid or make unlawful collective bargaining by any cooperative or other association of farmers, dairymen, gardeners or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them."

It is earnestly contended that by reason of the provisos quoted above a classification is made which is arbitrary because without basis, and that by virtue thereof there is excepted from the operation of the statute large numbers of persons who ought to be included therein, if anyone is. The arbitrary character of the classification thus made is evident when we consider that the declared purpose of the original Lever Act (40 Stat., 276) was that "it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of" certain necessities, including foods, and that the declared purpose of the amendment of October 22, 1919, as set forth in the presidential message of August 8, 1919, already referred to (*supra*, page 26), pursuant to which the statute was enacted, was to reduce the high cost of living in this country. And yet, although these were

the declared and are in any event the obvious purposes of the Act and its amendment, nevertheless, by the provisos to which we have referred, practically all of the producers of food, feeds and material from which wearing apparel is manufactured, may with impunity do all of the things which by the act are prohibited to others. Those named in the exceptions, though constituting by far the largest class of producers, and therefore in position to influence more than anyone else the distribution and price of necessities, may, if they choose, wilfully destroy for the purpose of enhancing the price or restricting the supply; knowingly commit waste or wilfully permit preventable deterioration; may hoard, as defined in Section 6 of the Act; may monopolize or attempt to monopolize, either locally or generally; may engage in any discriminatory and unfair, or any deceptive or wasteful, practice or device; may make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities, and may conspire to limit the facilities for transporting, producing, manufacturing or supplying, to restrict the supply, to restrict distribution, to prevent, limit or lessen production in order to enhance the price thereof, or to exact excessive prices. All these things, or any of them, may be done with impunity by every member of the excepted classes, or any thereof. But anyone else doing or attempting to do any of these things at once becomes a criminal. The effect upon the cost of living and upon the price, production and distribution of necessities of the doing of these things by the excepted classes is obvious. That such exceptions are wholly inconsistent with the declared purposes of the act and plainly tend to defeat, if

they do not wholly destroy them, cannot be denied. It follows inevitably that the classification thus made is wholly without basis. And it results with equal certainty that the statute here in question is a wholly arbitrary exertion of governmental power because it selects for its prohibitions and penalties only certain members of society and omits others in exactly the same relations, thereby depriving those selected of their liberty and of their property without the due process of law which the Fifth Amendment guarantees.

But further discussion is unnecessary, for the precise question has been considered and conclusively determined by this Court.

Connolly v. Union Sewer Pipe Co., 184
U. S. 540.

There the court was dealing with the Anti-trust Act of Illinois, condemning trusts or combinations or conspiracies to limit production, prevent competition and fix prices. The act contained this proviso (*id.* 554):

"Sec. 9. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

And because it contained this utterly indefensible attempt to subject certain portions of the community to restrictions from which the favored class was to be free, the court held the statute to be unconstitutional and void. The court said (*id.* 563-564):

"Returning to the particular case before us, and repeating or summarizing some

thoughts already expressed, it may be observed that *if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful.* Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

"We conclude this part of the discussion by saying that to declare that some of

the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary." (Italics ours.)

The language of the provision in Section 4 of the Lever Act as amended, is, in substance, identical with that which in the Connolly case was explicitly condemned. We submit that there is no possible distinction. Said Section 4, as amended, provides that the section shall not apply to farmers, etc., "with respect to the farm products produced or raised upon lands owned, leased or cultivated by them." The provision in the Illinois statute considered in the Connolly case was that the act should not apply to "agricultural products or live stock while in the hands of the producer or raiser."

It cannot be said that the decisions subsequent to the Connolly case with respect to the broad power of classification have in any way impaired its authority. In the late case of *International Harvester Co. v. Missouri*, 234 U. S. 199, at 215, the court said:

"It is said that the statute as construed by the Supreme court of the state comes within our ruling in *Connolly v. Union*

Sewer Pipe Co., 184 U. S. 540, but we do not think so. *If it did, we should, of course, apply that ruling here.*" (Italics ours.)

By the foregoing decisions it is, we submit, conclusively determined that the classification here attempted is arbitrary and without basis, and that the statute must for that reason be condemned. If any distinction is to be made between the Connolly case and the one at bar, it is that the statute here involved presents even a stronger case for the application of the principle.

But the Connolly case was decided under the Fourteenth Amendment, which, of course, relates only to state action, while this case is controlled by the Fifth Amendment relating to federal action. The Fourteenth Amendment does, while the Fifth Amendment does not, expressly prohibit the denial of the equal protection of the laws. But the guaranty of due process embraced in the Fifth Amendment necessarily includes such prohibition. The Fifth Amendment is just as surely a protection against arbitrary class legislation by Congress as is the Fourteenth Amendment with respect to similar action by the states.

Brushaber v. Union Pacific Railroad Co., 240 U. S. 1, involved the validity of the Income Tax Act of 1913. It was assailed upon the ground that it contained illegal discriminations. The broad power of Congress to classify for purposes of taxation, much broader than that which exists in the enactment of laws relating to crimes, was recognized. It was also recognized that the Constitution did not conflict with itself by conferring the taxing power on the one hand and virtually withdrawing it

through the due process clause on the other. Therefore, the statute there involved was upheld as a proper exercise of the taxing power. But the court in its opinion clearly defined its attitude with respect to the power of Congress as to other subjects of legislation and pointed out the limitations concerning classification that are found in the due process clause of the Fifth Amendment. Upon this point the court said (pages 24-25):

"And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, *the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.*" (Italics ours).

This is in accord with repeated prior decisions of the court. In *Caldwell v. Texas*, 137 U. S. 692, 697, the court said:

"Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established prin-

ciples of private right and distributive justice. *Bank of Columbia v. Okely*, 4 Wheat. 233, 244."

In *Giozza v. Tiernan*, 148 U. S. 657, 682, it was said:

"And due process of law within the meaning of the amendments is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper v. Texas*, 139 U. S. 462."

The phrase "due process of law" is the precise equivalent of the words "law of the land," as employed in *Magna Charta*.

Davidson v. New Orleans, 96 U. S. 101;
Missouri Pacific Railway Co. v. Humes,
115 U. S. 512, 519.

In *Bank v. Okely*, 4 Wheat. 234, 244, in defining the phrase "law of the land," it is said:

"As to the words from *Magna Charta* incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

In 5 *Ency. of United States Supreme Court Reports*, page 514, supporting the statement with the citation of many decisions of this Court, it is said:

"The prohibition against subjecting any person or class of persons to the arbitrary exercise of the powers of government implies, of course, that the laws shall operate upon all alike, and that no person or class of persons shall be singled out as the object of hostile, oppressive or discriminating legislation, but that equal protection and security shall be given to all under like circumstances in the enjoyment of their personal and civil rights."

In 6 Ruling Case Law, page 372, Section 367, with the citation of many decisions, it is said:

"Due process of law guaranteed by the federal Constitution has been defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. In order that a statute may comply with the necessary requirements as to due process of law, it must not violate the limitations as to classification imposed by the constitutional inhibition as to the denial of the equal protection of the laws."

In *McGhee on Due Process of Law*, page 60, it is said:

"The conception of law is opposed to all merely arbitrary or capricious action on the part of the state depriving individuals of life, liberty or property * * *"

"Under the American theory of constitutional government, in which constitutions

are a restraint even on the legislature, the idea has had a more fruitful development. Purely arbitrary decrees or enactments of the legislature directed against individuals or classes are held not to be 'the law of the land,' or to conform to 'due process of law.' The conception comes clearly to the front in Mr. Webster's definition of 'law of the land,' which has already been quoted, and it has been frequently repeated by the courts. 'Due process of law within the meaning of the (Fourteenth) Amendment,' said the Federal Supreme Court, 'is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' 'By the law of the land,' said the Michigan court, 'We understand laws that are general in their operation, and that affect the rights of all alike, and not a special act of the legislature, passed to affect the rights of an individual against his will and in a way in which the same rights of other persons are not affected by existing laws. Such an act, unless expressly authorized by the Constitution, or clearly coming within the general scope of legislative power, would be in conflict with this part of the Constitution, and for that reason, if no other, be void.' 'The clause 'law of the land',' said Mr. Justice Catron, when a member of the Supreme Court of Tennessee, 'means a general and public law, equally binding upon every member of the community.' In a later case, the same court, in order to bring out the constitutionality of legislative classification, preferred to define the phrase as meaning a law 'which embraces all persons who are or may come into like situation and circumstances.' "

In Willoughby on the Constitution, pages 873-874, it is said:

"The United States is not, by the constitution, expressly forbidden to deny to anyone the equal protection of the laws, as are the States by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the States, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws 'operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.'"

It is certain that the Fourteenth Amendment does not, and the Fifth Amendment does, relate to the District of Columbia. And yet the courts of the District have repeatedly held that the provisions of the Fifth Amendment prohibit the denial to persons residing therein of the equal protection of the laws.

Willson v. McDonnell, 265 Fed. 432, 48 Wash. Law Rep. 6;

Lappin v. District of Columbia, 22 App. Cas. (D. C.) 68, 76;

Moses v. U. S., 16 App. Cas. (D. C.) 428;
U. S. v. Ross, 5 App. Cas. (D. C.) 241;
Curry v. District of Columbia, 14 App.
 Cas. (D. C.) 423;
Stoutenburgh v. Frazier, 16 App. Cas.
 (D. C.) 229.

That the principle declared in these decisions of the courts of the District of Columbia meets with the approval of this Court is conclusively shown by these facts. In *Terminal Taxicab Co. v. District of Columbia*, 43 App. Cas. (D. C.) 120, an order of the Public Utilities Commission of the District of Columbia was attacked as not affording due process of law because it operated to deny the equal protection of the laws on account of its arbitrary classification. The courts of the District of Columbia considered the claim upon its merits and upheld the act, not because the Fifth Amendment did not condemn arbitrary classification, but because the classification there involved was, as the courts held, not arbitrary. The case came to this Court and was here reviewed.

Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252.

Upon the point here in question this Court said (241 U. S. 257):

"Complaint is made that jurisdiction has not been assumed over some other concerns that stand on the same footing as plaintiff. But there can be no pretense that the act is a disguised attempt to create preferences, or that the principle of *Yick Wo v. Hopkins*, 118 U. S. 356, applies. The

ground alleged by the Commission is that it did not consider that the omitted concerns did business sufficiently large in volume to come within the meaning of the act. There is nothing to impeach the good faith of the Commission or to give the plaintiff just cause for complaint."

Certainly the language quoted would not have been employed if this Court had entertained the view that under the Fifth Amendment there did not exist in the District of Columbia any constitutional prohibition against arbitrary class legislation.

Few, if any, of the state constitutions contain any express guaranty of the equal protection of the laws. Most of them contain only the guaranty of due process of law, or what is the same thing, "law of the land." And yet it has been consistently held by the highest courts of the several states in cases decided under such provisions of their respective constitutions, either before the adoption of the Fourteenth Amendment, or, if thereafter, without any reference thereto, that the guaranty of due process necessarily prohibits arbitrary class legislation.

In re Lowrie, 8 Colo. 499, 511 to 517;
Sears v. Cottrell, 5 Mich. 251;
Millett v. People, 117 Ill. 294;
Vanzant v. Waddel, 2 Yerk. (Tenn.) 260;
Stratton v. Morris, 89 Tenn. 497.

It follows, we think, with certainty that the statute here involved must be condemned because by reason of the arbitrary classification which it imposes it fails to afford due process of law as guaranteed by the Fifth Amendment.

VI.

THE BUSINESS OF DEALING AT RETAIL IN WEARING APPAREL IS NOT SUCH A PUBLIC BUSINESS AS WILL JUSTIFY OR PERMIT GOVERNMENTAL REGULATION OF RATES, CHARGES OR PRICES THEREIN.

The statute here in question, if valid, interferes in a drastic and sweeping way with the right of a merchant in wearing apparel to conduct his own business in his own way. It is an attempt to limit the right of such merchant to deal with his own property as he may see fit, to deprive him of the right to sell it at such prices as he may desire to charge and as the purchaser may be willing to pay, and to regulate the rates, charges and prices which he is permitted to fix in respect thereto. It follows inevitably that the statute is an unwarrantable interference with the liberty of contract and with the private property rights of individual citizens, and therefore in conflict with the due process clause of the Fifth Amendment, unless it be justified by the public character of the business so sought to be regulated.

But as this Court has lately held (*United States v. United States Steel Corporation*, 251 U. S. 417), mere size of a particular business does not affect the applicability or justify the enforcement of such a statute. And by the statute here in question every person, be his business large or small, dealing in or with any of the necessities therein defined is as to such business, subject to the provisions of the act, except those who are in terms expressly relieved

therefrom. This statute therefore relates not only to the business of the merchant prince, but to that of the man who sells shoe laces on the corner; not only to the business of the great metropolitan purveyors of food, but also to the huckster who sells from his push-cart; not only to the greatest coal company in Pennsylvania, but also to the corner grocery which deals in fuel by the bushel. Unless, therefore, this act can be sustained as a proper exertion of governmental power in respect to the smallest of these businesses, it cannot be sustained at all.

In the Slaughter House cases, 16 Wall. 36, at 127, Mr. Justice Swayne thus characterizes the fundamental rights with which we are here dealing:

"Life is a gift of God, the right to preserve it the most sacred of the rights of man. Liberty is freedom from all restraints, but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. *Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner.*" (Italics ours.)

In *Hirsh v. Block*, 48 Wash. Law Rep., page 378, decided June 2, 1920, and not yet officially reported, the Court of Appeals of the District of Columbia held unconstitutional Title II (relating to District of Columbia rents) of the Act of October 22, 1919, the very statute here in question (41 Stat. 398) for the reason that it was an attempt to regulate a business not public in its nature, and therefore operated to deprive persons of their liberty of contract and of their property without due process of law. In the

opinion the question is thoroughly discussed and the decision is directly applicable here. We submit that there is no such distinction between the business of selling wearing apparel to the public and the business of renting housing accommodations to the public as should render one properly subject to governmental regulation as to rates and charges and the other not.

In *Holter Hardware Co. v. Boyle*, 263 Fed. 134, the question with which we are now dealing received full consideration in the District Court of Montana. That case involved the constitutionality of a statute of Montana creating a state trade commission, with power to regulate prices and profits, including those in ordinary mercantile business. In a very able opinion, his honor, Judge Bourquin, condemned the act as obnoxious to the principle upon which we here rely. In that opinion the previous decisions of this Court are collected and the applicable principles as developed and declared thereby accurately stated. We can add little to what was there said.

That the business of dealing in or with wearing apparel at retail is not such a public business as will justify or permit governmental regulation is, we submit, established beyond question by the decisions of this and others courts.

In *Cooley's Constitutional Limitations*, 6th Ed., page 736, the learned author thus states the applicable principle:

"What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of

the merchant, and his charges, to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices." (Italics ours.)

And again (page 738) :

"in the following cases we should say that the property in business was affected by a public interest: 1. Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. * * * 2. Where the state on public grounds renders to the business special assistance by taxation or otherwise. 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public."

It does admit of doubt that the business of dealing at retail in wearing apparel is not within any of the classifications thus stated by Judge Cooley. On the contrary, as that learned author plainly states, no classification in that regard would be permissible "that would subject the stock of the merchant, and his charges, to public regulation."

In *Budd v. New York*, 143 U. S. 517, the court sustained as not prohibited by the Fourteenth Amendment a statute of New York regulating the charges of public elevators for handling grain. In the opinion the public character of the business is

plainly demonstrated, and it is likened to that of a railroad or other common carrier. Mr. Justice Brewer wrote a dissenting opinion, concurred in by Justices Field and Brown. Although a dissenting opinion, we venture to quote from it because its reasoning as applied to the illustrations therein given has been undoubtedly approved in later decisions of the court. In the course of that opinion the following appears (page 549) :

“But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man’s property is beyond the touch of another’s welfare. Everything, the manner and extent of whose use affects the wellbeing of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village. All the public of that village are interested in it; interested in the quantity and quality of the goods on its shelves, and their prices, in the time at which it opens and closes, and, generally, in the way in which it is managed; in short, interested in the use. Does it follow that that village public has a right to control these matters? That which is true of the single small store in the village, is also true of the largest mercantile establishment in the great city. The magnitude of the business does not change the principle. There may be more individuals interested, a larger public, but still the public. The country merchant who has a small warehouse in which the neighboring farmers are wont to store their potatoes and grain preparatory to shipment occupies the same position as the proprietor

of the largest elevator in New York. The public has in each case an interest in the use, and the same interest, no more and no less. I cannot bring myself to believe that when the owner of property has by his industry, skill and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value; nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.

"Surely the matters in which the public has the most interest, are the supplies of food and clothing; yet can it be that by reason of this interest the State may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, 'life, liberty and the pursuit of happiness'; and to 'secure,' not grant or create, these rights governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives to the public a right to control that use; and, third, that whenever the public needs require, the public may take it upon payment of due compensation."

German Alliance Insurance Company v. Kansas, 233 U. S. 382, sustained as not in conflict with the Fourteenth Amendment a statute of Kansas regu-

lating the business and the rates of fire insurance companies. The nature of that business and the controlling reasons why it was of such a public nature as to justify regulation are clearly expounded in the prevailing opinion. Therein the dissenting opinion of Mr. Justice Brewer in the Budd case, *supra*, is referred to and his assertions that such businesses as he there specified would not be subject to public regulation, apparently approved. In the course of the opinion the following appears (page 406):

"We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation.—(Page 409, referring to Mr. Justice Brewer's dissenting opinion in the Budd case.) The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such

result by extending the principle of the cases to fire insurance we shall presently consider.—(Page 411.) The underlying principle is that business of a certain kind holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.—(Page 414.) We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances.—(Page 416.) We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.'"

Lochner v. New York, 198 U. S. 45, condemned as prohibited by the Fourteenth Amendment a statute of New York limiting the hours of labor in the occupation of baker because an unlawful interference with the liberty and property right of contract.

Adair v. United States, 208 U. S. 161, declared invalid, as prohibited by the Fifth Amendment, an Act of Congress making it a criminal offense for a

carrier engaged in interstate commerce or an agent or officer thereof to discharge an employee simply because of his membership in a labor organization. The reason was that this constituted an unlawful interference with the liberty and property right of private contract.

Coppage v. State of Kansas, 236 U. S. 1, is to the same effect.

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, involved the question as to whether applicant's business, which consisted in furnishing automobiles from its central garage on orders, for the purpose of conveying the members of the public from place to place therein, was of such a public character as to justify governmental regulation of its rates. The court held that it was not, and speaking through Mr. Justice Holmes, said (page 256) :

"It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems

to be no difference between the plaintiff's service from its garage and that of a livery stable."

Federal Trade Commission v. Gratz, decided June 7, 1920, U. S. Adv. Ops., 1919-20, page 647 (not yet officially reported), contains the latest expression of the court upon this subject, as follows (page 650):

"All question of monopoly or combination being out of the way, a private merchant acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect to his own business methods must be preserved. United States v. Colgate & Co., 250 U. S. 300, United States v. A. Schrader's Son, 252 U. S. 85, 98."

Thus it appears that from the first to the last of its decisions upon the point here in question, this Court has constantly announced and continuously adhered to the principle which necessarily, and, as usually stated, in terms, excludes such a business as that in which appellees are engaged from the category of those which, as to the rates, charges or prices therein imposed, may be made the subject of governmental regulation.

German Alliance Insurance Co. v. Kansas, 233 U. S. 389, marks, we think, the extreme limit to which this Court has ever gone in upholding governmental regulation of this character. "And the lan-

guage of the opinion in that case, quoted above, renders it perfectly clear that while the court sustained the legislation there involved because of the nature of the business to which it was directed, it certainly would not uphold such legislation as that with which we are here dealing, when directed to such a business as that in which these appellées are engaged.

VII.

THE CONSTRUCTION PLACED UPON THIS STATUTE BY THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT THEREOF AS SO CONSTRUED NECESSARILY OPERATE TO DEPRIVE THE MERCHANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, IN THAT THEY ARE THEREBY DENIED THE RIGHT TO HAVE THE BENEFIT OF INCREMENTS IN VALUE WHICH MAY HAVE OCCURRED AS TO THE ARTICLES IN THEIR STOCKS WHILE HELD BY THEM IN PRIVATE OWNERSHIP.

It is alleged in the complaint (Record, p. 7), and admitted in the answer (Record, p. 21), that appellant as United States Attorney for the District of Colorado "insists and will insist that in determining whether any particular rate, charge or price for wearing apparel is just or unjust, reasonable or unreasonable, excessive or non-excessive, sole regard must be had to the actual original cost to the merchant of the particular and specific article in question, and that the present value thereof at the time

when the merchant fixes, makes or exacts the rate, charge, or price thereof cannot be taken into consideration, and solely by virtue of the authority and power vested in defendant (appellant) because of his official position, he will, by insistence upon such standard, institute and press prosecutions against plaintiffs (appellees), and each of them, seek and procure indictments against them and each of them, and do and commit the wrongful acts elsewhere herein more fully stated, unless prevented by order of this honorable court." It is also alleged in the complaint (Record, p. 8) and admitted in the answer (Record, p. 22), that "for the past several years, and particularly during the latter part of said period, the actual costs to merchants of the wearing apparel in which they deal have been rapidly and at frequent intervals advanced. As a consequence, each of these plaintiffs (appellees) and every merchant dealing in wearing apparel has in his stock numerous articles of exactly the same kind and quality, which, however, represent him greatly differing costs."

It would be no answer to say that the statute in question is not subject to the construction which the Department of Justice, through this United States Attorney, has placed thereon. As we have already attempted to demonstrate, no one can say what this statute means by its prohibition against rates or charges which are unjust or unreasonable. The fact that such a contention is made and insisted upon as that which this District Attorney admits, demonstrates the truth of the foregoing statement. But the appellant does not, nor does the department which he represents, even now admit the impropriety

of such a construction of the act. On the contrary, they insist upon its propriety and assert that they will prosecute in accordance therewith. We understand this to be the theory everywhere advanced by the Department of Justice, and that numerous prosecutions in many parts of the country have been and are being conducted with it as a basis.

Moreover, even if such construction be erroneous, yet the constitutional objection remains unimpaired.

That the provisions of the Fifth Amendment constitute restraints upon the executive and judicial powers of the Government, as well as upon the legislative, does not admit of doubt.

Murray v. Hoboken Land Co., 18 How.
272, 276.

This is also true of the Fourteenth Amendment in its restraints upon state action, and the rule is now well settled that when an executive officer of government, either state or federal, who is charged with the duty of enforcing a statute, particularly one so highly penal as that here involved, places thereon a wrong construction, and through the use of the power with which he is endowed by virtue of his official position, enforces or attempts to enforce the statute as so construed, the Constitution is violated, particularly where, as here, the construction so placed upon the statute necessarily operates, if so enforced, to destroy or impair rights guaranteed by the Constitution.

Yick Wo v. Hopkins, 118 U. S. 357, 373;
Raymond v. Chicago Union Traction Co.,
207 U. S. 20;

Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 287;

Cuyahoga River Power Co. v. City of Akron, 240 U. S. 462;

Green v. Louisville & Interurban Ry. Co., 244 U. S. 499, 507.

That the construction of the act so insisted upon by appellant would, if enforced, necessarily deprive appellees of their constitutional rights does not admit of doubt. Certainly the articles in the stocks of merchandise of the various merchants are the private property of the merchants respectively. The increments in value which may have occurred in respect to any such articles while so privately owned are unquestionably also the private property of the owner, as much so as the articles themselves. That the cost of reproduction or replacement, that is to say, the amount which it would cost a merchant to buy similar articles in the wholesale market at the date to which the inquiry is directed, determines the present value at that time, does not admit of doubt. This has been repeatedly held in rate cases, wherein present value is one of the important elements of the problem.

To say to a merchant that he may not sell articles in his stock of goods except at prices which wholly ignore present value or replacement cost and are fixed with sole reference to actual original cost of the particular article in question, necessarily deprives the merchant of the benefit of increments in value of which he is the absolute owner. Not only that, but upon a rising market, such as that which has prevailed for a long time, it necessarily destroys

or forces him to relinquish the established business, which also is his private property. For if prices in the wholesale market are rising and continue to rise, as has been for a long time true, and if the retail merchant is by this statute forced to sell his goods at prices fixed with sole reference to the original cost thereof and without any regard to present day wholesale prices, it is obvious that not enough will be realized from sales to replenish the stock and that the merchant will soon "sell himself out."

Nor is it any answer to say that if the merchant is unwilling to sell at prices so fixed he need not sell at all and may retire from business. This would involve the loss of the established businesses which these merchants, at great cost of time, effort and money, have built up and which they now own, possess and enjoy, as is admitted (Record, p. 5, par. III; p. 20 par. III).

In *Chicago & Northwestern Railroad Co. v. Dey*, 35 Fed. 866, at 880, Mr. Justice Brewer, speaking of a similar contention respecting railroad rates, said:

"For a government, whether that government be a single sovereign or one of the majority, to say to an individual who has invested his means in so laudable an enterprise as the construction of a railroad, one which tends so much to the wealth and prosperity of the community, that, if he finds that the rates imposed will cause him to do business at a loss, he may quit business and abandon that road, is the very irony of despotism. Apples of Sodom were fruit of joy in comparison."

That the construction of the act here insisted upon by appellant necessarily operates to deprive the merchants of their property without due process of law is we submit, clear beyond possibility of a doubt. The question has been many times decided in rate cases wherein is involved the value of the use of property, and not the value of the property itself, except as a basis for determining the value of the use thereof. And yet, if it be true, as this court has many times held, that in a rate case the value of the use of property is to be determined by reference to the present value and not the original cost of the property so used, how much the more must it be true in a case like this, where the question is as to the price which may be exacted for the disposal of the corpus of the property itself.

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 509, the court, speaking through Mr. Justice Brewer, said:

"The equal protection of the laws, the spirit of common justice, forbids that one class should by law be compelled to suffer loss that others may make gain. If the State were to seek to acquire the title to these roads under its power of eminent domain, is there any doubt that constitutional provisions would require the payment of just compensation, *that compensation being the value of the property as it stood in the markets of the world*, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take, not the title, but the use, for the public benefit *at less than its market value?*" (Italics ours.)

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 52, the court said:

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, *the company is entitled to the benefit of such increase.*" (Italics ours.)

In the Minnesota Rate Cases, 230 U. S. 352, 454, it is said:

"It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. *If that has been reckless or improvident, losses may be sustained which the community does not underwrite.* As the company may not be protected in its actual investment if the value of its property be plainly less, *so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost.* The property is held in private ownership, and it is that property and not the original cost of it, of which the owner may not be deprived without due process of law." (Italics ours.)

The words last quoted have special application to the case of the retail merchant. Upon a falling market, where prices at wholesale are continually decreasing, the merchant must inevitably suffer loss; for articles in his stock must be sold in competition with like articles in the stocks of other merchants

purchased at a later date and at less cost. It follows inevitably that upon a rising market he must be given the benefit of increments in value occasioned by increases in the wholesale cost since the articles in his stock were purchased. Otherwise, trade cannot go on and the merchants must cease to do business.

The greater emphasis to be laid upon the provisions of the Fifth Amendment when the corpus of the property itself is involved, instead of, as in rate cases, merely the use thereof, is demonstrated by decisions of this court.

Monongahela Navigation Co. v. United States, 148 U. S. 312, 325;

Boom Co. v. Patterson, 98 U. S. 403, 405, 408, 410;

United States v. Chandler-Dunbar Co., 229 U. S. 53, 76.

These cases hold that to omit from the calculation any item or element of value necessarily violates the constitutional rights of the owner of the property.

Many other cases might be cited, but the principle is so well settled that it is certainly unnecessary.

We submit without fear of successful contradiction that even though none of the other questions hereinbefore argued had been present in this case, and although the statute here involved, as written and enacted, was wholly free from any valid objection whatsoever, yet this objection to the construction placed upon said statute by the Department of Justice and to its enforcement in accordance

therewith, necessarily requires the affirmance of the decree below, to such extent at least as will suffice to forever prohibit further action by the Department of Justice, or any of its agents, of the kind complained of above.

The sole reference to this contention made in appellant's brief is found at pages 5 and 6 thereof and is that "a controversy as to the proper construction of a criminal statute does not authorize an injunction against prosecutions under that statute," in support of which *Jacob Hoffman Brewing Co. v. McElligott*, 259 Fed. 525, is cited. The intimation seems to be that the court may not in an equity case consider this contention and that it can only be presented and determined in a criminal proceeding under the statute. But the authority cited by appellant not only does not sustain but utterly destroys that claim. For in the course of the opinion in the *Jacob Hoffman* case (259 Fed. 527) it is said:

"So if, under a valid statute, he" (the United States Attorney) "threatens to proceed in a manner injurious to complainant's property rights, *and not authorized by the statute*, he transcends his authority, does not represent the United States, is not protected by the statute, and may be enjoined." (Italics ours.)

The decisions of this Court, cited at the beginning of this portion of our brief (*supra*, page 174), conclusively sustain this view. Since the Fifth Amendment is a protection not only against the legislative but also against the executive department of the government, it is impossible to perceive why the United States Attorney may not be enjoined from

proceeding in an unconstitutional manner, whether the unconstitutionality of his course of action arises from the invalidity of the statute under which he is acting or from any other cause. The question is, are the acts or threatened acts of the United States Attorney done or to be done by virtue of his office such as to deprive those against whom they are directed of their constitutional rights? And such acts are equally prohibited by the constitution, whether their illegality arises from the fact that the statute which purports to authorize them is itself unconstitutional or from the fact that no statute exists which purports to authorize them. That injunction will lie in the one case as well as in the other does not admit of doubt. It is said by appellant that a question as to the proper construction of the statute "may be determined in the first criminal case that arises under it", but this is equally true of a question as to the validity under the constitution of the statute itself. We submit with the utmost confidence that there is no merit in appellant's suggestion that the court is without authority to consider and determine in this case the important question which is the subject of the foregoing discussion.

VIII.

PROPERLY CONSTRUED, THE PROVISIONS
OF THE STATUTE HERE INVOLVED DO
NOT RELATE TO PRICES FIXED BY MER-
CHANTS FOR THE SALE OF WEARING
APPAREL AT RETAIL.

In presenting for the consideration of the court certain contentions respecting the proper construc-

tion of the statutory provisions here involved, we rely upon two well settled canons of construction. These are:

(a) "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter."

United States v. Delaware & Hudson Co., 213 U. S. 366, 408.

See also:

Union Pacific v. Laramie Stock-yards, 231 U. S. 190, 200;

Union Pacific v. Snow, 231 U. S. 204, 212, 213;

Hariman v. Interstate Commerce Commission, 211 U. S. 407.

(b) A penal statute is to be construed strictly in favor of the one against whom the penalty is sought to be enforced. "In the construction of a penal statute it is well settled also that all reasonable doubts concerning its meaning ought to operate in favor of the respondent."

Harrison v. Vose, 9 How. 372, 378;

Tiffany v. National Bank, 18 Wall. 409, 410;

Bolles v. Outing Co., 175 U. S. 262, 265;

United States v. Wiltberger, 5 Wheat. 76, 95;

Northern Securities Co. v. United States, 193, U. S. 197, 358.

That in the case at bar grave constitutional objections exist to any construction of the statute here

involved which would bring these merchants and their retail trade in wearing apparel within its purview has already been demonstrated.

That this is a penal statute of the most drastic character does not admit of doubt.

It follows inevitably that both canons of construction referred to above are certainly applicable here, and the discussion which ensues is in their light.

The portion of the act here in question provides that no one shall "make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities." The words "rate or charge" so used are not words ordinarily if ever employed to designate the amount at which articles are sold at retail. If a farmer sold a cow to his neighbor he would not know what was alluded to if asked what "rate or charge" he had received therefor. The word invariably employed to signify the amount asked or paid in a sale at retail is "price". The words "rate or charge" are commonly employed to cover such things as commissions, storage charges, and other costs involved in the handling and distribution of commodities. In short, they refer to the amount demanded and paid for a service rendered, and not to that which changes hands as the consideration for the transfer of title to property.

That the words are used in this act in the ordinary sense indicated above is plainly shown by the context. The unjust or unreasonable rate or charge denounced is one imposed "in handling or dealing in or with any necessities". And that the word "price" was at the time of the enactment of the original Lever Act (40 Stat. p. 277, Sec. 4), and also

at the time of the enactment of the amendment thereto (41 Stat. 298, Sec. 2), in the minds of the members of Congress as the proper word to use in connection with a sale, as distinguished from other acts in handling or dealing in or with any necessities, is, we think, conclusively shown by the fact that when, in the very section of the act with which we are here concerned, Congress came to legislate respecting conspiracies, one of the prohibitions was against a conspiracy "(e) to exact excessive prices for any necessities". It seems perfectly clear that, having in mind at the moment the word "price" and its significance as defined above and as shown by the quotation last made, the use of the words "rate or charge" instead of the word "price" in the clause of the section with which we are concerned, is exceedingly significant. It is, we submit, a demonstration that Congress did not intend the clause now sought to be enforced against these merchants to apply at all to sales at retail. It was the evident purpose of Congress to protect the public against extortion by retail dealers by prohibiting combinations and conspiracies among them to exact excessive prices. It was plainly the belief of Congress that in the absence of such combinations and conspiracies competition and the general laws of trade would sufficiently protect the consumer. But in the case at bar there is no claim on the part of appellant that any such combination or conspiracy exists. On the contrary, it is expressly alleged in the complaint (Record, p. 5, par. III) that no such combination does exist or ever has existed among these appellees, and that there is now and always has been unrestricted competition between them. These facts ap-

pellant does not deny (Record, p. 20, par. III). He merely states that he is without knowledge in respect thereto.

Further confirmation of the construction of the act for which we here contend is found in the provisions of other sections thereof.

In Section 5 (40 Stat. 277), provision is made for the issuance of licenses, and in the case of such licensees the President is authorized to require the discontinuance of any "storage charge, commission, profit or practice" which he finds to be unjust, and to determine and require adherence to that which he finds just. It will be noted that here also the word "price" is not used, but the word "profit" is, so that while the President might fix the profit to be derived from any particular transaction, he could not fix a price. Moreover, this Section 5 expressly provides that it shall not apply "to any retailer with respect to the retail business actually conducted by him" (40 Stat. 278), from which it is plain that retail prices could not in any event be fixed by the President. This is further confirmation of our claim that so far as retail merchants are concerned, this act was never intended to regulate their prices, but only to prohibit conspiracies and combinations to exact excessive prices.

There is nothing in this measure as originally enacted, or as amended, which indicates the purpose of Congress to regulate retail prices in respect to any commodity whatsoever except coal. The provisions in regard to coal are found in Section 25 of the Act (40 Stat. 284), and there the President is expressly authorized "to fix the price of coal and coke". This is the only provision of the act directed

to the regulation of prices in case of sales, and the use of the word "price" in this connection and in connection with the prohibition against conspiracies to exact excessive prices, already referred to, and the failure to use that word in any other portion of the act, furnishes, we think, convincing proof that when in the clause of Section 4 of the act here involved, both as it stood originally and as it was amended, Congress used the words "rate or charge" and not the word "price", it deliberately intended to exclude and not to include prices fixed in retail sales. This conclusion is fortified when we further consider that, except in relation to coal and the prohibition against conspiracies mentioned above, retail businesses were expressly excluded from the act, except that the provisions of Section 5 relating to the license system might perhaps be applied to a retail business wherein the gross sales exceeded \$100,000.00 per annum.

The scrupulous care with which Congress in every one of the war-time acts which contemplated the taking of private property or interference with private property rights provided for the protection of the owner and the payment to him of just compensation render it certain, we think, that Congress did not intend by the clause of the Lever Act here in question to impose any such drastic regulation upon retail dealers as the Department of Justice now contends. So radical a reversal of policy is not conceivable. An illustration of the protection to property rights afforded by all of the war-time legislation is found in the complete provisions for this purpose contained in the Federal Control Act relating to the railroads (40 Stat. 451). Like provi-

sions occur in all of the other war-time acts. They are present in the Lever Act itself in every provision thereof which contemplates interference with private property. Thus in Section 10 (40 Stat. 379), by which the President is authorized to requisition certain property, the requirement is that he shall ascertain and pay just compensation therefor, and if the compensation so determined be not satisfactory to the owner, the owner shall be entitled to receive at once seventy-five per centum thereof and may sue for the balance. A like provision occurs in Section 12, whereby the President is authorized to take over and operate plants for the manufacture of necessities, etc. And in Section 16 (40 Stat. 282), wherein the President is authorized to commandeer distilled spirits.

As we have already pointed out, no price fixing is contemplated by this act except in the case of coal. And by Section 25 of the act (40 Stat. 284) elaborate provision is made for careful investigation and inquiry and the right on the part of the coal producer or dealer to be heard before such price is fixed.

Under Section 5 of the Act (40 Stat. 277) similar investigation and inquiry are evidently contemplated before the fixing of any storage charge, commission, profit or practice.

And under both Section 5 and Section 25, the prohibition concerning prices to be charged for coal, or storage charges, commissions or profits to be assessed, or practices to be engaged in, does not come into force until after such investigation and inquiry and consequent definite fixing, and then no offense is committed unless the fixed limit be exceeded.

Under these circumstances, it is simply unbelievable that it was the intention of Congress by Section 4 of the Lever Act, as originally framed or as amended, to subject retail merchants to such penalties as the act imposes, when no standard had been fixed by which they might measure their conduct. It cannot be that the elaborate provisions concerning coal and the other matters to which we have referred would have been made if Congress had entertained any such intention. It must be that when, on October 22, 1919, Congress attached to Section 4 of the original Lever Act, the savage penalty clause which it now contains, it intended thereby to punish only in case a limit theretofore properly and definitely fixed had been exceeded, and did not intend to put the retail merchants of this country in the wholly intolerable situation forced upon them by the construction of this act upon which the Department of Justice insists; the words of the act are subject to a different construction, and one which will protect and not infringe the constitutional rights of the merchants. The settled canons of construction hereinabove referred to imperatively demand its adoption.

We submit, with respectful confidence, that the decree below should be affirmed.

GERALD HUGHES,
CLAYTON C. DORSEY,
Solicitors for Appellees.

CHARLES E. HUGHES,
Of Counsel.

No. 357.

OCT 17 1920

JAMES D. MAHER,

OCTOBER TERM, 1920.

IN THE
Supreme Court of the United States

HARRY B. TEDROW, as United States District Attorney,
for the District of Colorado, Appellant,

VS.

A. T. LEWIS & SON DRY GOODS COMPANY, THE
DENVER DRY GOODS COMPANY AND OTHERS,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLORADO.

BRIEF IN SUPPORT OF THE DECREE OF
THE DISTRICT COURT.

WM. A. GLASGOW, JR.,
LOUIS O. VAN DOREN,

amici curiae.

SEPTEMBER, 1920.

ALLEN, LAW & SCOTT, PAs., PHILADELPHIA.

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**In the Supreme Court of the United
States.**

OCTOBER TERM, 1920. No. 357.

*Harry B. Tedrow, as United States District Attorney, for
the District of Colorado, Appellant,*

vs.

*A. T. Lewis & Son Dry Goods Company, The Denver Dry
Goods Company, and others, Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO.

BRIEF IN SUPPORT OF THE DECREE OF THE
DISTRICT COURT.

The undersigned respectfully ask permission to file this brief in support of the decree of the District Court of the United States for the District of Colorado in the above case, wherein it was held (Record, page 47), "that the Act of Congress approved August 10th, 1917, entitled 'An Act to provide further for the national security and defense by

encouraging the production, conserving the supply and controlling the distribution of food products and fuel,' (Ch. 53, 40 Stat. 277), as amended by Act of Congress approved October 22d, 1919, and therein designated as 'The Food Control and the District of Columbia Rents Act,' (Ch. 80, 41 Stat. 298), as to the plaintiffs herein and each of them, is invalid because in conflict with the Constitution of the United States and Amendments thereto."

STATEMENT OF POINTS HERE PRESENTED.

We maintain that Section 4 of the Act of August 10th, 1917, as amended by the Act of October 22d, 1919, is invalid in that it declares it a crime punishable by fine or imprisonment or both "to engage in any *discriminatory or unfair or any deceptive or wasteful practice or device*, or to make any *unjust or unreasonable rate or charge* in handling or dealing in or with any necessities; to conspire, combine, agree or arrange with any other person * * * (c) to exact *excessive prices* for any necessities, or to aid or abet the doing of any act made unlawful by this Section."

While it seems doubtful whether the words "rate or charge in handling or dealing in or with any necessities" have any application to a merchant or broker buying "necessaries" and selling the same at a profit over and above cost, or at a loss based upon cost, and suggesting this question for the consideration of the Court, without arguing it, we will take for this argument that the words "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities" mean to charge any unjust or unreasonable price for "necessaries."

We desire to submit the following points:—

1. The words in Section 4 of the Act of August 10th, 1917, as amended:—

(a) "to engage in any discriminatory or unfair or any deceptive or wasteful practice or device;"

(b) "or to make any unjust or unreasonable rate or charge;"

(c) "to conspire, combine, agree or arrange with any other person * * * to exact excessive prices for any necessities."

are so indefinite and uncertain as to make this statute repugnant to the Sixth Amendment to the Constitution of the United States which provides that in all criminal prosecutions the accused "shall enjoy the right * * * to be informed of the nature and cause of the accusation."

2. The proviso of the Act, to wit, "That this Section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman or other agriculturist with respect to the farm products produced or raised on land owned, leased or cultivated by him, provided, further, that nothing in this Act shall be construed to forbid or make unlawful any collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners or other producers of farm products with respect to the farm products produced or raised by its members on land owned, leased or cultivated by them," renders, so far as the appellees in this case are concerned, the Act, and the Amendment, unconstitutional, in that it violates Article 5 of the Amendments to the Constitution as to "due process of law," and denies to the appellees the equal protection of the law.

3. The decree should be affirmed.

Point 1.

SECTION 4 OF THE ACT OF AUGUST 10th, 1917, AS AMENDED BY THE ACT OF OCTOBER 22d, 1919, IS UNCONSTITUTIONAL AND VOID, IN THAT IT FAILS TO INFORM THE ACCUSED OF THE NATURE AND CAUSE OF THE ACCUSATION.

(a) There is no definition in the Act of August 10th, 1917, or in the Amendment of October 22d, 1919, or at common law, of the words "discriminatory and unfair, or

any deceptive or wasteful practice or device, or unjust or unreasonable rate or charge," or the words "excessive prices," nor is there a standard or measure in the law which can be used to determine whether certain acts come within these words, but the courts and juries called upon to pass upon the Act, are left without any guide in the enforcement of its provisions, and it is impossible for a party engaged in business to determine what is unlawful under the Act, or what he may do and what he may not do, and the result is that he may subject himself to conviction of crime—to fine or imprisonment, or both—under a criminal statute which does not inform him of "the nature and cause of the accusation" but leaves the determination of what is a crime to the arbitrary conclusion of a court or jury.

The rule, governing the enactment of such statutes, is well stated in the case of *United States v. Brewer*, 139 U. S. 278, at page 288, as follows:—

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid (U. S. v. Sharp, Pet. C. C. 118). Before a man can be punished his case must be plainly and unmistakably within the statute (U. S. v. Lascher, 134 U. S. 624, 628.)"

In the case of *United States v. Reese*, 92 U. S. 214, at page 220, this Court by Mr. Chief Justice Waite, said:—

"If the legislature undertakes to define by statute a new offence and provide for its punishment it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

And again, at page 221:—

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should

be set at large. This would to some extent substitute the judicial for the legislative department of the Government."

These general statements by this Court indicate the clearness with which crime must be defined by statute, in order to comply with the provisions of the Sixth Amendment to the Constitution.

The question now presented is, does the Act under consideration in this case, in attempting to make it a crime "to engage in any discriminatory and unfair or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge * * * to conspire, combine, agree or arrange with any other person * * * to exact excessive prices" sufficiently define a crime so that an ordinary man may be able "to know with certainty when he is committing a crime" under the Act, or sufficiently inform him "what acts it is their duty to avoid"?

We maintain the proposition, that the Act of August 10th, 1917, as amended by the Act of October 22d, 1919, in the respects above specified, is so indefinite and uncertain as to violate the provisions of the Sixth Amendment to the Constitution.

The law upon this subject is well illustrated by the decisions under two Acts of Congress, to wit: The Act to Regulate Commerce and the Sherman-Anti-Trust Act.

(b) The Act to Regulate Commerce provides (Section 3): "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company * * * in any respect whatsoever, or to subject any particular person, company * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

By Section 10 of the Act it was provided that if any person "shall wilfully do or cause to be done or shall willingly suffer or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful * * * shall

be deemed guilty of a misdemeanor;" and the question thereafter arose whether declaring it unlawful to make or give "any undue or unreasonable preference or advantage" or "to subject any person to any undue or unreasonable prejudice or disadvantage" was a sufficiently clear and definite statement of the crime and whether the Act in this particular was repugnant to the Sixth Amendment to the Constitution.

Prior to the case arising under the Interstate Commerce Act, the case of *C. & N. W. Railway against Dey*, 35 Fed. Rep. 806, arose under the Statutes of Iowa, and Brewer J., on the Circuit, delivered the opinion and stated the law, as follows (at page 876):—

"Now the contention of complainant is that the substance of these provisions is that if the railroad company charges an *unreasonable rate* it shall be deemed a criminal and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this Act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

Subsequently the case of *Tozer* 72, U. S., 52 Fed. 917, arose under the above provisions of the Act to Regulate Commerce. Tozer was indicted in the District Court of the United States in Missouri for violation of the Act to Regulate Commerce, prohibiting the making or giving of "any undue or unreasonable preference or advantage to any particular person," &c., and for subjecting certain persons to "undue or unreasonable prejudice or disadvantage."

At the trial a conviction was had, and upon writ of error the case was taken to the Circuit Court of the United States, where Circuit Judge Brewer delivered the opinion, and in reversing the case said, at page 919:—

"But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable; there must be some definiteness and certainty."

And thus it was held that a crime could not by the statute be declared in such uncertain terms as the making or giving of "undue or unreasonable preference," or "the subjecting to undue or unreasonable prejudice or disadvantage," for there was no standard in the Act or known to the law by which the jury might determine what was *undue or unreasonable* preference or prejudice, or by which a party would be able to know in advance whether his act was criminal or not, and that therefore there was "nothing to justify a verdict of guilty against the defendant" and the judgment was reversed.

Immediately after the decision of this case the Interstate Commerce Commission issued its Sixth Annual Report, dated December 1st, 1892, and referred to the decision by Judge Brewer in the Tozer case above mentioned, and said, page 35:—

"The Court was clearly right in holding that no man can tell in advance what is or what a jury will find to be a reasonable charge, and that the criminality of an act should not depend upon whether a jury may think it reasonable or unreasonable. In order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. There must be some definiteness and certainty."

The Interstate Commerce Commission was charged under the Act with the duty of enforcing its provisions, and never since the Tozer case has the Commission undertaken, nor has there been in any Court, a prosecution under the criminal provisions of Section 3.

Afterward, in 1896, a similar question arose under a Kentucky Statute in the case of Louisville & Nashville Railroad Co. *v.* Commonwealth of Kentucky (99 Ky. 132; 33 L. R. A. 209). In that case the Louisville and Nashville Railroad Company was indicted, it being charged that it "did unlawfully charge, collect and receive * * * the said rate of \$1.50 per ton for the said transportation of said coal, being more than a just and reasonable compensation therefor, contrary to the form of statute," &c.

A conviction was had under the indictment, and on appeal the case reached the Kentucky Court of Appeals, and that Court cites with approval the case of Chicago & N. W. Railroad Co. *v.* Dey, 35 Fed. 866, and Tozer *v.* U. S., 52 Fed. 917, and says:—

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the Carrier Act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury, and especially so as that standard

must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

The judgment was reversed with direction to dismiss the indictment.

The same principle was announced in the case of *Louisville & Nashville Railroad Company v. Railroad Commission*, 19 Fed. 679, which was substantially approved by this Court, in the *Railroad Commission Cases*, 116 U. S. 307, at page 336.

The same principle is sustained by this Court in the case of *International Harvester Co. v. Commonwealth of Kentucky*, 234 U. S. 216. In this case the Harvester Company was indicted under a Kentucky statute which prohibited any combination for the purpose of fixing a price that was greater or less "than the real value of the articles." The Harvester Company contended that the law as construed by the Supreme Court of Kentucky "offers no standard of conduct that it is possible to know in determining what would be the 'real value' of an article, if there had been no combination." This Court held that the statute was too uncertain and indefinite to sustain a criminal prosecution, and that under the terms of the statute the ascertaining of the real value of the machinery "is a problem that no human ingenuity could solve;" and in reversing the case this Court said (page 223):—

"The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind."

The Court cites the case of *Nash v. U. S.*, 220 U. S. 373, hereinafter referred to, and says that the decision in this case is consistent with the *Nash* case.

The Harvester Company case was followed in the case of *Collins v. Commonwealth of Kentucky*, 234 U. S. 634, where Mr. Justice Hughes in speaking of the Harvester case, *supra*, said, at page 638:—

"It was found that the statute in its reference to 'real value' prescribed no standard of conduct that it was possible to know; that it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable."

The Harvester case was again followed in the case of American Seeding Machine Co. *vs.* Kentucky, 236 U. S. 660, on the ground that the "section of the laws of Kentucky referred to * * * offered no standard of conduct that it is possible to know," thus again approving the doctrine of the Tozer case.

The same principle announced in the Tozer case is maintained by this Court in Fox *vs.* Washington, 236 U. S. 273, in which case a criminal statute of the State of Washington, indefinite in terms, was upheld because the State Court in construing the statute, limited it to the punishment of acts which incited to "an actual breach of law" which were well known, definite and certain.

In the case of Waters-Pierce Oil Co. *vs.* Texas, 212 U. S., 86, this Court at page 109 cites the case of Tozer *vs.* U. S., *supra*, as having been decided by Mr. Justice Brewer, then Judge of the Circuit Court, and holding that "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable," and also cites the case of Railway Co. *vs.* Dey, *supra*, also decided by Judge Brewer, and refers to the case of Louisville & Nashville Railway Co. *vs.* Commonwealth, *supra*, in which a railroad company was indicted for charging more than a just and reasonable rate, and in which it was held "that the law was unconstitutional, for under such an act it rests with the jury to say whether a rate is reasonable, and makes guilt depend not upon standards fixed by law, but upon what a jury might think as to the reasonableness of the rate in controversy."

The Court, impliedly approving these last three cases, then

refers to the Texas antitrust statute under which the case arose, which made unlawful not only (page 111) "acts which accomplished the prohibited result, but also for those which TEND or are reasonably calculated to bring about the things forbidden," and says (page 109) :—

"But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the Act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

This Court recognized as beyond question the principle which had been announced in the Tozer and Dey cases, but distinguishes the Waters-Pierce case, on account of the provisions of the Texas statute.

The conclusion we draw from the authorities above referred to, is that the section of the Act making it a crime to charge an "unreasonable rate," or to "make or give any undue or unreasonable preference or advantage," or to subject any person to "any undue or unreasonable prejudice or disadvantage," is too uncertain and indefinite under the Constitution, no standard being furnished by which a party can determine whether his acts are lawful or unlawful.

If this be true we then submit that the Act of August 10th, 1917, as amended by the Act of October 22d, 1919, which undertook to declare it a crime to "make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," or to "conspire, combine, agree or arrange with any other person * * * to exact excessive prices for any necessities," is equally within the constitutional objection above referred to.

(c). We now invite the Court's attention to the decisions under the Sherman Anti-Trust Act, which are relied upon by the Government to sustain the prosecution in this case. The first section of that Act is as follows :—

"SECTION 1. Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of

trade or commerce among the several states or with foreign nations is hereby declared to be illegal. Every person who shall make such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the Court."

The leading case of indictment under this Act is *Nash vs. United States*, 229 U. S. 373, which is especially relied upon by the Government to sustain its prosecutions under the Act of August 10th, 1917, and the amendment thereto.

In the *Nash* case the point was raised that the statute in declaring it a crime to make a contract or engage in a combination "in restraint of trade or commerce among the several states or with foreign nations" was indefinite and uncertain and too vague to be enforceable by indictment, in view of the provisions of the Constitution as to crimes.

Since the decisions of this Court in the *Standard Oil Company* case and the *American Tobacco Company* case, *infra*, it may be taken as established that only "such contracts and combinations are within the Act as by reason of the intent or the inherent nature of the contemplated acts prejudice the public interests by *unduly restricting competition or unduly obstructing the course of trade*" (page 376), and in the *Nash* case it was urged that as there was no standard fixed by the Act making it clear what was an undue restriction or undue obstruction of trade, the Act was too indefinite and uncertain.

Before discussing the *Nash* case we desire to invite the Court's attention to the case of the *Standard Oil Company vs. U. S.*, 221 U. S. 1, upon which the decision in the *Nash* case was based.

In the *Standard Oil Company* case the Court held that the Sherman Anti-Trust Act prohibits "all contracts and combinations which amount to an *unreasonable or undue restraint* upon trade in Interstate Commerce," and in his dis-

sending opinion Mr. Justice Harlan pointed out (page 97), quoting the report of the Senate Judiciary Committee, that the former decisions in this Court "construed the Act to prohibit any contract or combination in restraint of trade without regard to whether such restraint was *unreasonable or undue*" (italics ours), and that if the Court read into the Act the words "undue" and "unreasonable," such a construction "would render the criminal or penal statute indefinite and uncertain, hence to that extent utterly nugatory and void, and would practically amount to a repeal of that part of the Act," for the reason that the Act contained no declaration of what is "reasonable" or "unreasonable" restraint of trade.

The majority of the Court held that Section 1 of the Act declared only such contracts unlawful as *unreasonably or unduly restricted* trade, and in the opinion answered the suggestion of Mr. Justice Harlan as to the criminal features of the Act, showing that by a proper construction a "standard" or "measure" was "indubitably" contemplated, by which to determine whether a certain course of conduct "unreasonably" or "unduly" restrained trade.

Mr. Chief Justice White delivered the opinion of the Court and reviewed the history, development and meaning of the phrase "restraint of trade" at common law and under the law of this country.

And said (page 54):—

"Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessities of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly, that it was undue enhancement of price. 3. That to protect the freedom of contract of the individ-

ual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, &c., caused those things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade."

Here we have the standards to be used at common law in determining whether a "restraint of trade" was unlawful, and thereafter it is shown, in the opinion, that the "rule of reason," or "the light of reason," must be used in determining whether certain acts come within the common law definition of "restraint of trade."

The learned Chief Justice continues (page 59):—

"Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a *well-known meaning at common law or in the law of this country* they are presumed to have been used in that sense unless the context compels to the contrary.

"As to the first section, the words to be interpreted are: 'Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal.' As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is what was the rule which it adopted?

"In view of the common law and the law in this country as to restraint of trade which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

"(a) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as restraint of trade in a broad sense:

"(b) That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new which would constitute an interference, that is an undue restraint.

"(c) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required *that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the*

common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." (Italics ours.)

From the foregoing quotation it is obvious that the Court held that in the enactment of the statute Congress intended (1) only to make unlawful and criminal contracts in "unreasonable" or "undue" restraint of trade; and further (2) that "indubitably contemplating and requiring a standard" by which to determine whether a contract was in "undue" or "unreasonable" restraint of trade and thereby prohibited, Congress intended to and did adopt the standard "which had been applied at the common law and in this country" as "the measure used for the purpose of determining whether in a given case a particular act had not brought about the wrong against which the statute provided."

The Court then held that unless the statute was construed in the light of the common law, and with the definition at common law of restraint of trade as a part of the statute, fixing a measure or standard by which to determine whether a particular act was lawful or unlawful, "the enforcement of the statute was impossible because of its uncertainty," thus recognizing the principle of the Tozer case, *supra*, that in order to make the statute valid it was necessary that there should be some standard or measure in the law to guide a party in determining whether a certain act was lawful or unlawful. The Court said (pages 63, 64):—

"In substance, the propositions urged by the Government are reducible to this: That the language of the statute embraces every contract, combination, &c. in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true be-

cause as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then *the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty.* The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly *fixing a standard* that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute." (Italics ours.)

Thus the Court answers the suggestion of Mr. Justice Harlan in his dissenting opinion, recognizing that the words

"undue or unreasonable restraint of trade" would have been too indefinite upon which to base a prosecution for crime, unless these words are to be construed in the light of the common law definition thereof, and unless the statute adopted the "standard" or "measure" furnished by "the common law and the law of this country" and well known, "for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

Following the Standard Oil case, the case of *Nash v. United States* (220 U. S. 373), reached the Supreme Court, which was an indictment, under the Anti-Trust Act, for conspiracy in restraint of trade, and the question was raised by demurrer "that the statute was so vague as to be inoperative on its criminal side."

The Court, by Mr. Justice Holmes, in referring to the "objection to the criminal operation of the statute" refers to the Standard Oil Company case and the American Tobacco Company case, and says (page 376):—

"Those cases may be taken to have established that only such contracts and combinations are within the act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

The Court then refers to the fact that the Anti-Trust Act only refers, as shown in the opinion in the Standard Oil case, to such "restraints of trade as were defined at common law and for which a measure or standard was provided," and Mr. Justice Holmes says (page 377):—

"But apart from the common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."

But the Court recognizes the principle announced in the *Tozer* case and referred to in the Standard Oil Company

case that there must be some standard or measure by which to determine the lawfulness or unlawfulness of the act, and with such standard or measure, furnished by the law, each party is responsible for estimating rightly whether the act contemplated is within the "degree" which the standard or measure fits. Every man must exercise his intelligence in determining whether his proposed act is unlawful and how far he can properly go, but a statute creating a crime must, as the Anti-Trust Act did, furnish a "standard" or "measure" by which a party can determine what acts are lawful and what criminal. The Act of August 10th, 1917, and the amendment furnish no such "standard" or "measure" as to what may be considered as an "unjust" or "unreasonable" rate or charge, or what is to be the basis of determining what are "excessive prices."

The Court then cites a number of instances in which a party is required to estimate rightly the degree of his act, to wit, murder, manslaughter, killing another by driving an automobile furiously into a crowd, driving negligently through a street, but in all of these cases the "measure" or "standard" for guidance of a party, is given either by the common law or by statute.

The Court then concludes:—

"But without further argument the case is very nearly disposed of by *Waters-Pierce Oil Co. vs. Texas* (1, 212 U. S. 86, 109), where Mr. Justice Brewer's decision (*Tozer case*), and other similar ones were cited in vain."

There was no intention on the part of the Court by this expression—"in vain"—to disapprove the decision of Mr. Justice Brewer in the *Tozer case*, and other cases, but to call attention to the fact that the principle there announced was not applicable in the *Nash case* or the *Waters-Pierce Oil Company case*, because as stated in that case (212 U. S. 86, at page 109):—

"But the Texas statutes in question do not give the broad power to a Court or jury to determine the crimi-

nal character of the act in accordance with their belief as to whether it is reasonable or unreasonable as do the statutes condemned in the cases cited."

It seems obvious, therefore, that in the *Waters-Pierce Oil Company* case the principle of the *Tozer* case, while recognized, was not applied, because the Texas statute was not in violation of the principle announced in that case. The *Tozer* case was not disapproved in the *Nash* case because under the decision of the Supreme Court in the *Standard Oil Company* case the Anti-Trust statute furnished a "standard" or "measure" by which to determine whether an act was lawful or unlawful. Whereas, the Act to Regulate Commerce, under which the *Tozer* case arose, furnished no "standard" or "measure" by which a party could, by the use of his intelligence determine what might be held by a jury to be "undue preference" or "undue prejudice." We therefore submit that the present case is not controlled by the case of *Nash v. United States*, but is controlled by the principle announced in the *Tozer* case, and afterwards so frequently approved by the lower Courts and by this Court.

(d) The difficulty, uncertainty and confusion which would result from the jury or the Court determining what is "unjust discrimination" or "undue preference" or what are "reasonable rates" under the Act to Regulate Commerce are shown in the case of *Texas & Pacific Railway v. Abilene Cotton Oil Co.* (204 U. S. 426), and it was there held that no action could be maintained against a carrier for "unjust discrimination" or "undue preference" or for having charged "unreasonable rates" until a "uniform standard" or "measure" had been established by a report and finding of the Interstate Commerce Commission, by which the Court and jury could determine whether the discrimination was "undue" or whether the rates were "unreasonable." This view has been affirmed by this Court in a number of cases, unnecessary to cite, the conclusion from which, however, is that the phrase "undue discrimination" and the words

"unreasonable rates" are indefinite and uncertain, and that there is no standard or measure in the Act to Regulate Commerce to be applied by a Court and jury in determining whether there is undue discrimination or whether rates are unreasonable until the Interstate Commerce Commission has passed thereon and made its finding and report.

This is further illustrated by the case of *United States ex. Freight Association* (166 U. S. 290), where Mr. Justice Peckham in referring to the question of whether the Sherman Anti-Trust Act only forbade contracts "in unreasonable restraint of trade" said (pages 331, 332):—

"If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities; which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of

course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. To say, therefore, that the Act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves."

Since the decision in this last case, however, this Court, so far as the Sherman Anti-Trust Act is concerned, has cured the difficulty by holding that a "standard" or "measure" clearly exists, established by the common law and the law of this country, for the guidance of parties in determining what is "unreasonable restraint of trade" (Standard Oil Co. case, 221 U. S. 1). But no such standard or measure, as to unjust discrimination or unreasonable rates, was created by the Act to Regulate Commerce and this Court established by its decision in the Abilene Cotton Oil case that no action could be maintained in a court for damages for violation of these provisions of the Act, without first securing from the Interstate Commerce Commission its report and findings, as to whether certain acts constituted unjust discrimination or whether certain rates were reasonable or unreasonable, this finding of the Commission to be used conclusively by the jury as its "standard" or "measure."

We submit that the Act of August 10th, 1917, as amended October 22d, 1919, in declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; or to conspire, combine, agree or arrange with any other person * * * to exact excessive prices," is just as indefinite and uncertain as the Act to Regulate Commerce, which declares it unlawful to "unjustly discriminate" or to "charge unreasonable rates." There is no standard or measure erected by the statute, by the common law or by any line of court decisions in this country which a party may use in determining what is an "unjust or unreasonable rate or charge in handling or dealing in or with any necessities" or in determining what are "excessive prices."

May we ask whether the words in the statute, "unjust or unreasonable rate or charge" or "excessive prices," mean prices or charges above the market value of the article, or do they mean above the replacement value of the article? Do they mean that the profit to be realized shall not be unreasonable? If so, what is a reasonable profit? In fact, may we ask what the District Court could charge the jury as the "standard" or "measure" to be used by it in determining whether a "rate or charge" is unjust or unreasonable, or whether a price is "excessive." This case would have to be submitted to the jury for its arbitrary determination, without any guide except their feelings and our objection to this is the same stated by Mr. Justice Holmes in *International Harvester Co. v. Kentucky*, 234 U. S. 216, at page 223:—

"The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind."

The foregoing portions of the Act of August 10th, 1917, as amended, being just as indefinite and uncertain as the provisions of the Act to Regulate Commerce, we submit that no standard or measure is furnished by which to de-

termine what is an "unjust or unreasonable rate or charge" or what are "excessive prices," and that the statute in this respect is too indefinite and uncertain upon which to maintain a criminal prosecution.

(c) In quite a number of the District Courts of the United States, Section 4 of the Act of August 10th, 1917, as amended, has been held unconstitutional, and the opinion of Anderson, J., in the case of *United States vs. Armstrong*, 265 Fed. 683, is typical of these decisions, although there are other opinions by District Judges in accord and equally illuminating.

Perhaps as many Judges of the District Court have held Section 4 of the Act constitutional, but the only Circuit Court of Appeals which has passed upon the question is in the Second Circuit, where it was held in the case of *Weed vs. Lockwood*, U. S. Attorney (not yet reported), that Section 4 of the Act was constitutional.

In this case Manton, Circuit Judge, refers to the legal principle announced in the case of *Tozer vs. United States*, 52 Fed. 917, and then cites among other cases, *Standard Oil Co. vs. U. S.*, 221 U. S. at page 69, and says:—

"The so-called 'rule of reason' as announced in the *Standard Oil Co. vs. U. S.*, 221, page 1, and *United States vs. American Tobacco Co.*, 221, U. S. 106, has changed the rule as laid down in the *Tozer* case."

We respectfully submit that this is error; and that the so-called "rule of reason" was invoked by the Supreme Court in the *Standard Oil* case as a guide in applying the "measure" or "standard" under the common law, in order to save the Anti-Trust Statute from being held invalid under the principle of the *Tozer* case, and that our system of government, as it stands today, contemplates and requires, as it has from the adoption of the Constitution that Congress shall define and state the nature of the act or omission which is made a crime, and that such description must be either expressed in the act or indubitably implied therein by definite reference to a pre-existing common law standard of conduct.

In the case of *Weed vs. Lockwood*, *supra*, Hough, Circuit Judge, also delivered an opinion, in which he held:—

"When the Lever Act was amended this country was and still is in a state that may be described as 'official war.' This is substantially the finding in the *Kentucky Distilleries* case, *supra*. It may be likened to the European 'state of siege,' and continues in Congress all the war powers of the United States. If we were in a state of 'official' peace, this statute would in my judgment, be unconstitutional. Under *International Harvester Co. vs. Kentucky*, 234 U. S. 216; the condemnation there expressed (especially page 223), is applicable here word for word. It would also be constitutionally obnoxious because it is a gross piece of class legislation; incapable of distinction from that condemned in *Connolly vs. Union, etc.*, 184 U. S. 540.

"But the Statute is begotten by war, and is constitutionally excused (*i. e.*, justified) by the war power which is superior to and not to be measured by the police powers of the several States."

We submit that the learned Judge could hardly have intended what appears to be the plain meaning of the foregoing statement; the words used are capable of the common understanding that a Judge of the Federal Circuit Court of Appeals has held that during a state of "official" war an Act of Congress may be valid though unconstitutional—although clearly repugnant to provisions of the Constitution. If this be the intention of the learned Judge a more amazing doctrine could hardly be announced.

If it be held that the existence of an "official" state of war or even actual hostilities authorizes the Congress to violate the Constitution in any one particular, it would follow that the Congress could violate the Constitution in every particular, with the result that the moment a state of war was declared we would cease to be a country governed under the Constitution.

It is, we submit with deference, entirely out of the question that a state of war thus enlarges the powers of Congress or of any department of this Government, to the extent that such department may immediately pass beyond constitutional limitations and clothe itself with unlimited and arbitrary power. If this were possible a political faction dominant in Congress and also holding the executive branch of the Government, could at any moment by the simple expedient of declaring war with some other country, overturn the Constitution and set it at defiance, and establish a dictatorship which the courts would be bound to respect. This subject was long ago discussed in the case of *Ex parte Milligan*, 4 Wallace, pages 120-1, from which we quote the following:

"These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield

of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

As late as December, 1910, this Court said in *Hamilton vs. Kentucky Distilleries*, 251 U. S. 146, at page 156:—

"The war power of the United States, like its other powers, and like the police powers of the States, is subject to applicable constitutional limitations."

It seems almost unnecessary to suggest that every power of the Federal Government is and must be a constitutional power, and that its source and authority therefor must be found in the Constitution. And yet the learned Circuit Judge, in his opinion, seems to hold that a state of "official" war has set aside the protective features of the Sixth Amendment to the Constitution; and if this view should be maintained Congress can just as lawfully deny the right of trial by jury or impose cruel and unusual punishment, or enact *ex post facto* laws, or require the giving of excessive bail, or put a citizen twice in jeopardy, or destroy the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure.

When the Constitution declares that it is essential to the creation of crime by Statute that the nature and cause of the offense shall be clearly stated, this constitutional safeguard is always in force, and just as much in time of war as in time of peace, and we submit that Section 4 of the Act of August 10th, 1917, as amended, fails to conform to the Sixth Amendment of the Constitution, and

that this defect is not excused or justified by the existence of either an "official" or "actual" state of war.

Point 2.

THE ACT OF AUGUST 10TH, 1917, AS AMENDED BY THE ACT OF OCTOBER 22D, 1919, IS UNCONSTITUTIONAL, IN THAT IT DEPRIVES CITIZENS OF THE EQUAL PROTECTION OF THE LAW, AND UNDERTAKES TO DEPRIVE A PERSON OF "LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW."

It is true that in terms the Fourteenth Amendment to the Constitution restrains the States from "denying to any person within its jurisdiction the equal protection of the laws," but practically the same limitation is imposed by the Fifth Amendment to the Constitution, which forbids the depriving a person "of life, liberty or property without due process of law."

The Act of August 10th, 1917, as amended, arbitrarily sets up two classes of citizens, although persons in each class may be engaged in dealing in the same commodity or "necessaries." The act attempts in its fourth section to declare certain acts and practices to be criminal, but these are made criminal for only a part of the dealers in or handlers of "necessaries." There is set up a class of people free from any such restraints, and expressly exempted from the criminal provisions of the statute, and in fact, exempt from other provisions of the Act.

Section 4 of the Act after declaring that it is "made unlawful for any person" to do certain acts therein set forth, and fixing the penalty of fine or imprisonment, or both, for the violation thereof, provides:—

"That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman or other agriculturist with respect to the farm products produced or raised upon land owned, leased or cultivated by him. Provided, further, that nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any co-operative

association or other association of farmers, dairymen, gardeners or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased or cultivated by them."

The result is that this exempted class may make "unjust or unreasonable rate or charge in handling or dealing in or with any necessities," or the members of the class may "conspire, combine, agree or arrange with any other person * * * to exact excessive prices for any necessities," while the merchant not a member of this favored class, who makes "any unjust or unreasonable rate or charge in handling or dealing in or with any necessities" or who may "conspire, combine, agree or arrange with any person * * * to exact excessive prices for any necessities" may be adjudged a criminal and subjected to a fine or imprisonment, or both. A farmer may enter into a conspiracy with a person, not within the favored class, for the sale of the farmer's products at "excessive prices." The farmer, who reaps the benefit, is exempt from prosecution, but his co-conspirator may be punished by fine or imprisonment, or both.

If the member of the favored class sells the necessities at the market price he is not subject to prosecution therefor, but if one not a member of this favored class sells at the market price, and this price is found by a jury to be an "unjust or unreasonable rate or charge" or "excessive prices" he may be convicted under the Act and punished in accordance with the provisions thereof.

We submit that this deprives every citizen of the United States not a member of the favored and arbitrary class, provided in the Act, of the equal protection of the laws, and of "liberty or property without due process of law."

Our position is amply sustained by the case of *Connelly vs. Union Sewer Pipe Company*, 184 U. S. 540, which involved the constitutionality of a so-called antitrust statute of Illinois, which made the violation thereof a crime, and which contained this provision:—

"This Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser,"

thus making an exempted class, composed of producers of agricultural commodities and raisers of live stock. Mr. Justice Harlan in delivering the opinion of the Court, said (at page 560) :—

"These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under the statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the Act, may be punished as criminals, while agriculturists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe."

And again (at page 563) :—

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged

in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State."

In the case of *Weed v. Lockwood*, U. S. Attorney (C. C. A., Second Circuit, not yet reported), Circuit Judge Manton in delivering the opinion of the Court held that the proviso in Section 4 of the Act of August 10th, 1917, as amended, exempting farmers and others from the criminal features of the Act, did not render the fourth section of the Act unconstitutional.

Circuit Judge Hough in his opinion in the same case held that this proviso would render Section 4 of the Act unconstitutional under the *Harvester Co.* case and "constitutionally obnoxious, because it is a gross piece of class legislation incapable of distinction from that condemned in *Connolly v. Union, etc.*, 184 U. S. 540," if it were not for the fact that we were in a state of "official war."

For the purpose of a ready comparison of the views of Circuit Judge Manton in the *Weed* case, *supra*, and of Judge

Anderson in the case of *United States vs. Armstrong*, 265 Fed. 683, on the matter of the discriminatory proviso embodied in Section 4 of the Act of August 10th, 1917, as amended, we print in parallel columns the views of the two Judges, as follows:—

U. S. Circuit Judge Manton in *Weed vs. Lockwood*:

"It is argued that farmers, gardeners, ranchmen, dairymen or stockmen or other agriculturists with respect to other farm products may make unjust and unreasonable rates and charges with impunity, but that if the miners of coal, manufacturers and dealers in farm machinery and equipment, refiners of sugar or dealers in food products do so, they violate the Act. Therefore, there is a discrimination of class. The power of classification has had a very broad range. In *Atchison, Topeka & Santa Fe R. R. Co. vs. Matthews* (174 U. S. 96) the Court said:—

"The very idea of classification is that of inequality so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

"Whether it would have been better policy to have in-

U. S. District Judge Anderson in *U. S. vs. Armstrong*, 265 Fed. Rep. 683, 691:—

"Hence I conclude that an arbitrary classification by Congress is repugnant to the 'due process' clause of the Fifth Amendment. The power to make an arbitrary classification is arbitrary power, and arbitrary power has no place in our system of government. Ours is a government of law, not of men.

And again, at page 692:—

"In the first section of the Act (Section 3115 ¼ E) 'foods, feeds and fuel' are called necessities, and the provisions are as to necessities thus defined. By amended Section 4 farmers, gardeners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen, and other agriculturists—persons who produce foods and feeds—with respect to the products produced or raised upon land owned, leased or

cluded the farmer or ranchman or not to have made such a comprehensive classification as the statute does, is not within our province to decide. Whether the existing circumstances and the times call for such a rule of conduct as to exclude farmers from the purposes of the Act, was a matter for the Congress to decide. Congress could make this classification and it be held not in contravention of the Constitution (*Internatl. Harvester Co. v. Missouri*, 234 U. S. 199).

"Some latitude must be allowed to legislative judgment in selecting the basis of community. It must be palpably arbitrary to authorize a judicial review of it, and it cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched (*Mo., Kan. & Tex. R. v. May*, 194 U. S. 267; *Williams v. Arkansas*, 216 U. S. 79). Here Congress has limited the exemption from the operation of the statute to farmers, gardeners and agriculturists only with respect to products

cultivated by them, may wilfully destroy such foods and feeds for the purpose of enhancing the price or restricting the supply thereof, may knowingly commit waste or wilfully permit preventable deterioration of such foods and feeds in or in connection with their production, manufacture or distribution, may hoard such products, may monopolize or attempt to monopolize such products, may engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or may make any unjust or unreasonable rate or charge in handling or dealing in or with such products, and may conspire, combine, agree or arrange with any other person to limit the facilities for producing, or restrict the supply, or to restrict the distribution, or to prevent, limit or lessen the production in order to enhance the price or exact excessive prices for such products, with impunity, while all other persons are to be punished as criminals for doing the same acts, including those who produce, supply or distribute the other necessary fuel. The section so provides, notwithstanding the

of the land produced upon land owned, leased or cultivated by them. Congress may have had in mind the encouragement of the farmers to larger production. It was essential to have full production from land in the emergency.

"In *German Alliance Ins. Co. vs. Supt. of Ins.* (233 U. S. 389) the Court said:—

"A citation of cases is not necessary, nor for the general principle, that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise."

"We think Congress may well, as it did, legislate exempting the farmer exercising its war powers under the Constitution."

fact that the excepted and the included persons are all in the same general class; that is, they are all alike engaged in producing, handling and distributing necessities—foods, feeds and fuel. The constitutional warrant for this legislation is found in the grant of power to Congress to declare war, to raise and support armies, and to provide and maintain a navy. Those who produce foods to feed the soldiers and sailors, those who produce feeds to feed the horses and mules required by the army, and those who produce fuel to transport the soldiers and propel the ships of the navy, are all alike helping to win the war, and are all alike in the same general class. * * *

"My conclusion is that the classification in amended Section 4 is arbitrary and not natural or reasonable; that such section is repugnant to the 'due process' clause of the Fifth Amendment, and is therefore void."

We submit that the discrimination in the Act in favor of "farmers, gardeners, agriculturists" and others is not based upon any substantial or proper ground of public policy, is arbitrary in its nature, and renders the Act unconstitutional under the Fifth Amendment to the Constitution.

Point 3.

THE DECREE OF THE COURT DECLARING THE ACT OF CONGRESS, APPROVED AUGUST 10TH, 1917, AS AMENDED BY THE ACT APPROVED OCTOBER 22D, 1919, INVALID BECAUSE IN CONFLICT WITH THE CONSTITUTION OF THE UNITED STATES AND THE AMENDMENTS THERETO, SHOULD BE AFFIRMED.

Respectfully submitted,

WM. A. GLASGOW, JR.,
LOUIS O. VAN DOREN,

Amici curiae.

Philadelphia, Pa., September, 1920

APPENDIX.

SECTION 4 OF THE ACT OF AUGUST 10TH, AS AMENDED BY THE ACT OF OCTOBER 22D, 1919.

That Section 4 of such Act of August 10th, 1917, is hereby amended to read as follows:—

That it is hereby made unlawful for any person wilfully to destroy any necessities for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or wilfully to permit preventable deterioration of any necessities in or in connection with their production, manufacture, or distribution; to hoard, as defined in Section 6 of this Act, any necessities; to monopolize or attempt to monopolize, either locally or generally, any necessities; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict distribution of any necessities; (d) to prevent, limit, or lessen the manufacture or production of necessities in order to enhance the price thereof; or (e) to exact excessive prices for any necessities, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding \$3,000 or be imprisoned for not more than two years, or both; provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned,

leased, or cultivated by him; *provided* further, that nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.'

